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RECORD, CASE No. 13,658.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 105.

ADAM KOHN, APPELLANT,

vs.

JOHN McNULTA, RECEIVER OF THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED SEPTEMBER 26, 1889.

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INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint	2	1
Order appointing receiver, &c.	38	14
Application of Adam Kohn for leave to intervene, &c.	48	19
Order granting leave to Adam Kohn to file intervening petition, &c.	49	19
Intervening petition of Adam Kohn	49	20
Motion of receiver to require Kohn to give security for costs	58	24
Order requiring Kohn to give security for costs	58	24
Motion to set aside order of reference of intervening petition	59	25
Order granting motion to set aside order of reference	59	25
Answer of receiver to intervening petition	60	25
Reply to answer of receiver	62	27
Motion to strike reply from the files	64	28
Trial and verdict	64	28
Motion for new trial	65	29
Decree setting aside verdict and dismissing petition	66	29
Allowance of appeal	66	29

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 15, 1892.

	Original.	Print.
Order allowing bill of exceptions	67	30
Bill of exceptions	68	30
Evidence for intervening petitioner	68	30
Testimony of James A. Duncan	68	30
Adam Kohn	70	31
William Butler	100	51
James Caldwell	116	62
Christopher Kohn	124	67
Henry Holland	133	73
Frank Heminger	143	78
John Shay	155	85
Evidence for the receiver	159	83
Testimony of Samuel M. Grasse	159	83
Frank Howard	180	100
John Boyer	187	104
Evidence for intervening petitioner in rebuttal	194	108
Testimony of Christ. Kohn	194	108
Charge to the jury	195	109
Judge's certificate	197	110
Appeal bond	198	110
Clerk's certificate	199	111

1 *Pleas.*

Pleas in the circuit court of the United States for the northern district of Ohio, western division, held at the United States court-rooms, in the city of Toledo, in said district aforesaid, before the Honorable Howell E. Jackson, circuit judge for the sixth circuit, and the Honorable Martin Welker, district judge for the district aforesaid, on the fourth day of February, being a day of the December term, 1888, of said court, in the year of our Lord one thousand eight hundred and eighty-nine, and in the one hundred and thirteenth year of the Independence of the United States of America.

MARTIN W. SANDERS, *Clerk.*

2 And thereupon, to wit, on the 17th day of December, A. D. 1886, the following bill of complaint was duly filed in the clerk's office of said court, to wit:

Circuit Court of the United States, Northern District of Ohio.

UNITED STATES OF AMERICA, }
Northern District of Ohio. }

To the hon. judges of said court, in chancery sitting:

Your orators, Thomas B. Atkins, Henry K. McHarg, Jacob Stout, and Stephen H. Thayer, humbly complaining, show unto your honors that they are respectively the owners and holders of divers of the bonds hereinafter more particularly described, which are secured by mortgages on certain parts of the railway until lately held and owned by the Wabash, St. Louis and Pacific Railway Company, and as such bond creditors they bring this bill of complaint in behalf of themselves and of all other bond creditors in like relation who may desire to become parties hereto or to obtain the relief hereby sought; and thereupon your orators show:

First. On February 1, 1867, there existed a corporation, consolidated under the laws of Ohio, Indiana, and Illinois, called the

3 Toledo, Wabash & Western Railway Company, which said corporation then owned and possessed a line of railway extending from Toledo, in the State of Ohio, westwardly through the State of Indiana, through Springfield to Camp Point, in the State of Illinois, together with a branch from Clayton to Hamilton, both in Illinois, together with a large and valuable equipment and stock of machinery, tools, and supplies. On said date last aforesaid the said Toledo, Wabash & Western Railway Company, as thereto by law duly authorized, did in proper form of law sign, seal, execute, acknowledge, and deliver unto Isaac Knox and James R. Jesup, as trustees, a certain trust deed or mortgage, a copy whereof is filed herewith as Exhibit A and prayed to be taken as a part of this bill of complaint, wherein and whereby the said railway corporation did convey and mortgage all and singular its lines of railway, contract and leasehold rights, equipments, appurtenances, franchises, and rolling stock as the same are at large described in the said convey-

ance, reference being thereto had, as security for the payment of a then contemplated issue of bonds, commonly called convert-
4 ible bonds, not to exceed fifteen million dollars in amount, to be executed and negotiated by said railway company, which said bonds were to be made payable on February 1, 1907, with interest at the rate of seven per cent. per annum, but payable quarterly, in New York city, on the first days of May, August, November, and February in each year, on the surrender of the coupons attached to such bonds. It was further expressly covenanted in and by the said trust deed that the said corporation would, on the first day of February and August in each year, commencing with the year 1868, pay over to the commissioners of the sinking fund, to be composed of the president and two directors of said railway corporation, the sum of $25,000 until and including the maturity of said bonds, to be invested in the purchase of such convertible bonds or such other corporate or United States bonds as were by said mortgage designated; and it was further expressly covenanted by said mortgage that upon any default for six months in the payment of any instalment of interest or sinking fund the trustees should have the right to enter into the possession of all and singular the said mort-
5 gaged property and operate the same and sell the same and out of the proceeds pay the interest in arrears and the principal of such bonds as were outstanding under said mortgage.

Second. Your orators show that the said Toledo, Wabash and Western Railway Company, shortly after the date of said mortgage, to wit, about the year 1867, did issue and negotiate for value its convertible bonds secured by said mortgage to the amount of $2,610,000, and no more, and such bonds are still outstanding in the hands of innocent holders for value, and together with the coupons thereon constitute a valid subsisting lien upon all and singular the property described in the said mortgage and the tolls and income thereof.

Third. Your orators further show that shortly after the execution of said mortgage the same was duly recorded in the proper office in each of the counties in the States of Ohio, Indiana, and Illinois wherein any of the said railway was situate, and thereafter, to wit, about October 6, 1868, the said Toledo, Wabash and Western Rail-
way Company consolidated its property and stock with those
6 of the Decatur & East St. Louis Railroad Company, which then owned and operated a line of railway extending from Decatur to East St. Louis, in Illinois, the name of such consolidated corporation being the Toledo, Wabash & Western Railway Company; and thereafter, to wit, in the year 1876, by virtue of certain judicial proceedings and decrees of foreclosure of junior liens by the common pleas court of Lucas county, Ohio, and the circuit court of Cass county, Indiana, and the circuit court of Vermilion county, Illinois, all and singular the lines of railway of the said Toledo, Wabash & Western Railway Company situate in the States of Ohio, Indiana, and Illinois, and all its equipment, appurtenances, and franchises were sold to certain junior bondholders, who reorganized a corporation called the Wabash Railway Company, which thereupon became the owner of all such lines of railway subject to said

mortgage of February 1, 1867, and also subject to certain prior sectional mortgages, which will be more particularly described hereafter.

Fourth. Afterwards and while it was such owner and in the actual possession and enjoyment of all the said lines of railway
7 the said Wabash Railway Company, on May 17, 1879, as thereto duly authorized by law, did sign, seal, execute, acknowledge, and deliver unto Solon Humphreys and Daniel A. Lindley, as trustees, its certain deed of trust or mortgage, a copy whereof is herewith filed as Exhibit B, conveying unto said trustees all the railroad, road-bed, and right of way of the party of the first part, extending from the city of Toledo, in the State of Ohio, through the State of Illinois to Meredocia, with branch of said road from Clayton to the east bank of the Mississippi river at Hamilton, in said State, and with branch of said road leading from Decatur, in said State, to East St. Louis, in the same State, with branch of said road from Meredocia to Camp Point and another branch from Meredocia to Naples and East Hannibal, and the equipments, material, supplies, appurtenances and franchises, and all contract rights and leasehold interests then existing or which might thereafter be acquired or used by the said Wabash Railway Company in connection with said road so mortgaged was executed to secure the payment
8 of a then contemplated issue of corporate bonds to an amount not exceeding two thousand bonds of one thousand dollars each, to mature April 1, 1909, and to bear interest at the rate of seven per cent. per annum, payable on the first days of April and October in each year. Said mortgage was duly recorded according to law shortly after the date thereof in each of the counties in the States of Ohio, Indiana, and Illinois wherein any part of said mortgaged line of railway was situate, and by virtue of such record the said mortgage of May 17, 1879, became and has ever since continued to be a valid and subsisting lien upon all the lines and branches of railway, equipment, appurtenances, and franchises which are therein more particularly described and which then constituted the entire system of railway property which belonged to the said Wabash Railway Company.

Fifth. Presently, after the said May 17, 1879, the said Wabash Railway Company, for value and in the usual course of business, issued and negotiated sixteen hundred of the bonds intended to
9 be secured by said mortgage, amounting to one million six hundred thousand dollars, and that amount of bonds is still outstanding in the hands of divers innocent holders, and constitutes, together with certain interest due thereon, a valid and subsisting lien upon the property included in the said mortgage. Your orators expressly aver that the said Wabash Railway Company never at any time issued or negotiated any of the remaining 400 of said bonds, amounting to $400,000, and such 1,600 of bonds so issued as aforesaid are the only bonds that are entitled to share in the benefit and security of the said mortgage of May 17, 1879.

Sixth. Thereafter, to wit, about November, 1879, the said Wabash Railway Company entered into an agreement of consolidation with

a corporation of the State of Missouri called the St. Louis, Kansas City and Northern Railway Company, which then and there owned and operated certain lines of railway extending from St. Louis to Kansas City, in the State of Missouri, together with certain branch lines connected therewith, all of which property was subject to certain liens and mortgages to secure the payment of a large
10 amount of bonds issued by said Missouri corporation. The name of the consolidated corporation thereby formed was the Wabash, St. Louis & Pacific Railway Company, and it was expressly agreed and covenanted as one of the conditions and considerations of said merger that the new consolidated corporation assumed and agreed to pay all and singular the debts and obligations of both of said constituent corporations and all liens upon the property thereof, and by reason of such express covenants and the statute in that behalf the said Wabash, St. Louis & Pacific Railway Company became primarily liable upon all and singular the outstanding bonds issued by the Toledo, Wabash & Western Railway Company under the mortgage of February 1, 1867, and also upon all the outstanding bonds issued by the Wabash Railway Company under the mortgage of May 17, 1879, as well as personally liable upon all the other outstanding bonds issued by any of its predecessor corporations and secured by mortgage on any part of its system of railway, and said consolidated corporation, the Wabash, St. Louis & Pacific Railway Company, entered upon the due performance of its covenants
11 and its legal duty in that behalf and continued to pay all the interest accruing after such consolidation upon any and all of said mortgage bonds of every kind resting upon any portion of its property until about June 1, 1884.

Seventh. On the first day of June, 1880, the said Wabash, St. Louis & Pacific Railway Company did sign, seal, execute, acknowledge, and deliver unto the Central Trust Company of New York and James Cheney its certain deed of trust or mortgage, conveying to them as trustees all and singular its lines of railway wherever situate, together with all the equipment, appurtenances, and franchises thereto belonging (but subject in all things to all prior mortgages), to secure the payment of a contemplated issue of bonds not to exceed fifty millions of dollars in amount, to bear six per cent. interest, which said mortgage was duly recorded so as to become a lien upon the said railway property therein described. Thereafter, as your orators are advised, bonds to the amount of about $17,000,000 were negotiated in good faith and for value and passed into the hands of divers persons and corporations.

Eighth. Thereafter, to wit, on April 10, 1883, by the vote
12 of the requisite number of its stockholders and in due conformity with law, the entire system of railway, equipment, appurtenances, leasehold, and property and assets of every kind belonging to the said Wabash, St. Louis & Pacific Railway Company was leased to the St. Louis, Iron Mountain & Southern Railway Company, to be held and operated by said last-named corporation or its assigns for the term of ninety-nine years next ensuing after the

date of said lease, upon the terms, conditions, and covenants in said lease recited, a copy whereof is herewith filed as Exhibit C.

At the date of said lease and since hitherto the said St. Louis, Iron Mountain & Southern Railway Company was owned by the Missouri Pacific Railway Company, a corporation of Missouri. The said Iron Mountain Company had no superintendents, auditors, conductors, engineers, brakemen, station agents, or employees; it did not operate its own road or any of its leased lines, but all of them were operated by the Missouri Pacific Railway Company as a branch of its system. Continuously from the date of said lease until the appointment of receivers, as hereafter recited, the entire railway of the
13 Wabash, St. Louis & Pacific Railway Company was in fact operated by the Missouri Pacific as a branch thereof and by the agents and employees of said last-named corporation, who received the income and disbursed the same and included the operations of said Wabash, St. Louis & Pacific Railway Company in its own books, account, and reports and statements, and from the date of said lease to the 27th of May, 1884, the said lessor corporation was not in possession or control of any of its railroad property and did not operate the same and employed no agents, conductors, engineers, or other operating employees, and bought no material for use in the operation of its railways and kept no accounts thereof, and there is no method of ascertaining what were the earnings and expenses of said system of railways belonging to the Wabash, St. Louis & Pacific Railway Company during said period except by an examination of the books and accounts of the Missouri Pacific Railway Co.

Ninth. Afterwards, on May 28, 1884, in a certain action instituted by the said Wabash, St. Louis & Pacific Railway Company, in the circuit court of the United States for the northern district of Illinois, against The Central Trust Company, James Cheney, The St.
14 Louis, Iron Mountain and Southern Railway Company, and others, a decretal order was entered of record by the said court appointing Solon Humphreys and Thomas E. Tutt receivers of the said complainant corporation, and directing the said receivers to take possession of the said railway in Illinois and hold and operate the same as the officers of said court and subject to the orders thereof, and the said action so instituted as aforesaid is still pending and undetermined and no final decree has ever been rendered therein, and the said Humphreys and Tutt are still in the possession and control of said property as receivers under the said order of appointment of May 28, 1884.

Tenth. Afterwards and on May 29, 1884, in a certain action instituted by the said Wabash, St. Louis & Pacific Railway Company, in the circuit court of the United States for the eastern district of Missouri, against The Central Trust Company, James Cheney, The St. Louis, Iron Mountain & Southern Railway Company, and others, a decretal order was entered of record in said court in said cause appointingSolon Humphreys and Thomas E. Tutt receivers of
15 the property of complainant, and afterwards and prior to January, 1886, the said last-named cause, in which the Central

Trust Company and James Cheney, as trustees under said mortgage of June 1, 1880, had appeared and filed a cross-bill to foreclose what is commonly called the said "general mortgage" executed to them, was consolidated with the cause pending in the said circuit court of the United States for the eastern district of Missouri, which was an original bill brought by the said Central Trust Company and James Cheney, as trustees, to foreclose the same general mortgage. Thereafter, upon January 6, 1886, in the said consolidated cause the said last-named court entered of record a decree of foreclosure of said general mortgage of June 1, 1880, and ordered the sale of all and singular the railway, property, and franchises in said decree described, but expressly decreeing that such foreclosure and sale and the title and possession thereunder were to be in all things subject to the rights, equities, and liens of mortgages prior to the said mortgage of June 1, 1880, executed by said defendant mortgagor or any of its predecessor corporations and which cover any portion
16 of the said railway and property. Your orators herewith file a copy of said decree, marked Exhibit D, and pray that it may be considered a part of this bill of complaint.

Eleventh. Afterwards, to wit, on —— —, the equity of redemption of said Wabash, St. Louis & Pacific Railway Company in and to all the said railway and property subject to such prior liens was sold under the said decree of January 6, 1886, and bid off by a purchasing committee composed of James F. Joy, Ossian D. Ashley, Thomas H. Hubbard, and Edgard D. Wells, and such parties have, as your orators are advised, obtained a decree, dated June 15th, 1886, a copy of which is herewith filed as "Exhibit G," confirming their said purchase, and have received from the master a conveyance vesting in them the legal title to said property, subject in all things to the rights and equities of the bondholders who hold mortgages or liens on any part of such system which are prior in date to June 1, 1880, the date of said foreclosed general mortgage, but said purchasing committee have not been placed in possession of any part of said lines of railway, nor have the said purchasers paid any considerable portion of the claims and debts referred to in said decree of
17 January 6, 1886, as being charges against the receiver or against the property prior in equity to the bonds secured by the general mortgage.

Your orators show that the said purchasing committee was created and constituted in pursuance of a certain plan of reorganization dated August 6, 1884, and an agreement between the general mortgage bondholders, the said purchasing committee, and others, dated July 15, 1885, copies of which are herewith filed and made part of this bill of complaint as Exhibits E & F.

Twelfth. Your orators further show that certain valid liens — created by corporations which were predecessors of the said Wabash, St. Louis & Pacific Railway Company upon all the main-line divisions of said railway which are east of the Mississippi river and covered by the trust deeds or mortgages of 1867 and 1879, under which your orators claim. Such prior mortgages are as follows:

On the division from Toledo to the western boundary line of Ohio,

a first mortgage to the Farmers' Loan & Trust Company securing $900,000 of seven per cent. bonds.

Also a second mortgage to Edwin D. Morgan securing $1,000,000 of 7 per cent. bonds.

On the division from the western boundary of Ohio to the eastern boundary of Illinois, a first mortgage to the Farmers' Loan & Trust Company securing $2,500,000 of 7 per cent. bonds.

Also a second mortgage to E. D. Morgan to secure $1,500,000 of 7 per cent. bonds.

On the division from the eastern boundary line of Illinois to Meredocia, a first mortgage to George Griswold, Alexander M. White, and Henry Worden to secure $2,496,000 of 7 per cent. bonds.

Also a second mortgage to Solon Humphreys and James R. Jesup to secure $2,500,000 of 7 per cent. bonds.

On the division from Carthage to Clayton, Illinois, a first mortgage to John N. A. Griswold, James R. Jesup, and Lucian Tilton to secure $3,000,000 of 6 per cent. bonds.

On the division from Meredocia to Camp Point and Clayton, a first mortgage to John T. Treat to secure $500,000 of 7 per cent. bonds.

And there are also two other sectional and prior mortgages which cover portions of railway also covered by the subsequent mortgage of 1879, which are as follows:

On the division from Decatur to East St. Louis, a first mort-
19 gage to Isaac H. Knox to secure $2,700,000 of 7 per cent. bonds.

On the division from Naples to East Hannibal, a first mortgage to Alexander M. White to secure $500,000 of 7 per cent. bonds.

Thirteenth. Your orators further show that while the said receivers in possession of the property since May 28, 1884, have paid large sums of money in paying the expenses of non-productive leased and otherwise-acquired lines not subject to the liens of the two mortgages under which your orators claim as aforesaid, and have also paid substantially all the interest which has accrued pending the receivership upon the main lines of railway west of the Mississippi river, between St. Louis and Kansas City, they have wholly failed, neglected, and refused to pay up the accruing interest on the bonds secured by the mortgages of 1867 and 1879, and have also failed, neglected, and refused to pay up the accruing interest on the divisional bonds secured by the ten different first and second mortgages hereinbefore recited, until now about two and a quarter years' interest is due and wholly unpaid upon each and all of said twelve mortgages, all of which has accrued pending the operation of
20 said railway property by the receivers. Besides such current defaulted interest, the said receivers have wholly failed, neglected, and refused to keep down the interest accruing during the receivership upon certain funded coupon obligations which were issued to represent over two years' interest on all of said before-mentioned mortgages (except the Hannibal & Naples and the mortgage of 1879), which had been defaulted upon prior to 1877, and by reason of such failure and neglect of the receivers the holders of such

funded-debt obligations are by the terms thereof entitled to presently enforce the whole amount of said two years' defaulted coupons against the several divisions of said property which are subject to the mortgages under which said coupons were issued.

Fourteenth. Your orators further show that the said Toledo, Wabash & Western Railway Company did not nor have any of its successor corporations kept and performed the covenant in said mortgage of February 1, 1867, that it would deposit $50,000 each year, commencing with 1868, as a sinking fund; and so it is that while there ought to have been over $900,000 deposited in
21 such sinking fund for the benefit and security of the persons holding bonds issued under such mortgage, your orators are informed and believe and so charge that in fact no deposits at all have been made for the benefit of such sinking fund, and the conditions of such mortgage in that respect have been continually disregarded and broken.

Fifteenth. Your orators further show that the said lines of railway covered by the general mortgages of 1867 and 1879 constitute an important and harmonious system, extending from Toledo, on Lake Erie, to Burlington, Quincy, Hannibal, and St. Louis, on the Mississippi river, and that as such system each portion is capable of being worked in harmony with and without any detriment to the remainder, and prior to November, 1879, when it was consolidated with lines west of the Mississippi river, as aforesaid, it was so operated for many years; that prior to such consolidation the Wabash Railway Company, which then owned the property, also owned and used upon its said railroad a large and valuable equipment, consisting of over 200 engines, 39 baggage, express, and mail cars, 68 pas-
22 senger, 500 freight, and 101 caboose cars, which equipment was of the value of several millions of dollars, and was all subject to the said two mortgages of 1867 and 1879, and the gross earnings were about five million dollars per annum, and the net revenue over $1,500,000. Since said consolidation, in November, 1879, the successor corporation, called the Wabash, St. Louis & Pacific Railway Company, also purchased and placed in service on its lines of railway a large additional amount of equipment, and the receivers have also purchased and placed in use on the railway a large amount of equipment. All such new equipment, whether purchased by the successor corporation or the receivers, have been used indiscriminately upon the system, both east and west of the Mississippi river, without any specific or valid apportionment of any part of the same to any particular division of road; and your orators are advised by counsel and so claim that an equitable and fair proportion of such added equipment belongs and must in law be allotted to the portion of the railway east of the Mississippi river and the several divisions thereof, and is, as other after-acquired property, embraced in both the said mortgages of 1867 and 1879 and
23 bound by the lien thereof to all intents as though the said equipment had been owned and in use when said mortgages were severally executed.

Sixteenth. Your orators further show that the trustees named

in the mortgage of February 1, 1867, were James R. Jesup and Isaac H. Knox. As your orators are advised and so charge, the trustees have interests adverse to those holding bonds under such mortgage, for the reason that they represent other bonded interests as trustees and also are in fact in entire sympathy with the purposes and reorganization plans of the said purchasing committee, and, well knowing the judicial possession of the property for over two years, and that the interest and sinking fund instalment on said mortgage, of which they were trustees, was greatly in arrears, they took no steps whatever to enforce or protect the rights of the bondholders or to secure the proper application of the revenues of the mortgaged property to the payment of the interest for which it was pledged, or to prevent the misappropriation of such income.

In the mortgage of May 17, 1879, the trustees named are
24 Solon Humphreys and Daniel A. Lindley. The first-named is a director and large stockholder in the Wabash, St. Louis & Pacific Railway Company and largely interested in the floating debt of said corporation, and both he and his cotrustee, Lindley, are in full accord with the purposes and reorganization plans of said purchasing committee and, well knowing the judicial possession of the property for over two years, and that the interest on said mortgage was largely in arrears, neither of said trustees have taken any action to enforce or protect the rights of the bondholders or to secure the proper application of the revenues of the mortgaged property to the payment of the interest for which it was pledged, and for such reasons the bondholders have the equitable right and are compelled to bring this action in their own names and behalf to protect and enforce their rights.

Seventeenth. Your orators further show that when the Wabash Railway Company consolidated with the St. Louis, Kansas City & Northern Railway Company, on November 7, 1879, and thus ceased to exist, only $1,600,000 of bonds secured by the mortgage of May 17, 1879, had been issued or negotiated, and the remaining
25 $400,000 were unissued and in the custody of the corporation, and by force of such consolidation and the consequent extinction of said Wabash Railway Company said unissued $400,000 of bonds became wholly worthless and incapable of being thereafter validly issued, and for several years the said successor corporation reported that there were only $1,600,000 of bonds outstanding under said mortgage, but now the said purchasing committee claim to have acquired the ownership of such $400,000 worthless and invalid bonds, well knowing all the facts, and that they were issued illegally and after the obligor had ceased to exist; and they give out and pretend that by virtue of such acquired ownership of said $400,000 worthless bonds they are entitled to one-fourth of the mortgage security, which in equity belongs exclusively to the *bona fide* holders of the sixteen hundred bonds which were legally issued under said mortgage.

Eighteenth. Your orators further show that besides the sum of four million two hundred thousand dollars secured by the two general mortgages of 1867 and 1879, the lines of railway therein em-

braced are covered also by underlying first and second mortgages to the aggregate of $14,896,600 additional for principal alone;
26 that all of said mortgages, except one of $300,000, draw seven per cent. interest, making, on a total bonded debt of $19,106,000, an annual interest charge of about $1,330,420, while, as appears by the statements of the purchasing committee, the earnings of the lines east of the Mississippi river for the year 1885 applicable to interest were only $401,324, and said purchasing committee further admit and publicly declare "that no reorganization of the company occupying its general lines can be made with the present weight of interest-bearing debt resting upon them which can sustain itself and live."

Your orators further show that upon the two general mortgages of 1867 and 1879 and the ten underlying divisional morgages hereinbefore recited there is now due for interest defaulted on since the receivership and interest thereon about $3,500,000, and that by reason of the failure to pay the interest upon the funded-debt coupons belonging to such bonds there is also due on that account and secured by the said mortgages (except the Hannibal & Naples and the mortgage of 1879) the further sum of over $3,000,000, making the sum of $6,500,000, which is now due and immediately
27 enforcible for unpaid interest on said bonds, and thus enlarging the mortgage indebtedness resting on the railway lines hereinbefore described to the total of about $25,000,000, with interest, and that rapidly being compounded, and thereby constantly and largely decreasing your orators' security and threatening it with extinction.

Wherefore your orators charge that the bondholders secured by said mortgages of 1867 and 1879 have by the admission of such purchasing committee an inadequate security for their debt; that the Wabash is hopelessly insolvent, and that the said purchasing committee are not personally responsible upon the bonds secured by any of said mortgages, and that your orators are therefore clearly entitled in equity to have the income and revenues of said mortgaged property sequestered by the court for the benefit of the bondholders in the order of their priorities until such time as the property shall be foreclosed and sold under the final decree of this court.

Nineteenth. Your orators further show that, pending the judicial proceedings to foreclose the said general mortgages executed in 1880 by the consolidated Wabash, St. Louis & Pacific Railway Com-
28 pany, the said general mortgage bondholders and the said purchasing committee, both by their published plans and circulars and also private statements, gave the prior bondholders to understand that upon the title being perfected in the committee under such reorganization plan the interest upon all the mortgage bonds upon the main lines of the system which were prior to said general mortgage of 1880 would be adjusted and paid, and that the net earnings of the lines would be thenceforth sufficient to promptly pay all the accruing interest on the said prior bonds.

And your orators further show that said plan of reorganization and the decree of foreclosure are both expressly based upon such

recognition of prior rights of your orators and other bondholders, and until after the purchase made by said committee, about June, 1886, your orators and other prior bondholders had no knowledge or intimation that there was to be any attempt made on the part of said purchasing committee or those they represent to refuse or delay payment of the past-due interest to your orators and other bondholders or to demand a surrender or postponement of any of
29 their debts or priorities, but so it is that shortly after their purchase and for then the first time the said committee, by their pamphlet, which is hereto filed, demand, under threats of continued and expensive contest and litigation, that your orators and all other of their cobondholders holding bonds secured by mortgages east of the Mississippi river should allow such purchasing committee to go into possession and enjoyment of the said property and all its revenues, with an agreement from such prior-lien bondholders that they would not only forbear the present payment of the interest past due on their bonds, subject expressly to which the said committee had bought the property, but would also consent to a funded reduction of about thirty per cent. of their agreed rate of interest, and that the bondholders secured by the mortgages of 1867 and 1879 should also waive all rights of foreclosure under their liens, except as based upon three consecutive years' default in the payment of interest on such mortgages.

Your orators show that they and a very large number of the bondholders secured by the said general and divisional mortgages east of the Mississippi river decline and will absolutely refuse to
30 make any such surrender of their rights and remedies, and the said purchasing committee have been so advised and notified, and thereupon, as your orators are advised and believe and so charge, for the express purpose of clouding the rights of such bondholders by setting up adverse and paramount claims against the property which is subject exclusively to the lien of your orators and others, the said purchasing committee do now give out and pretend that they hold and own a large portion of the equipment and valuable terminals in use on and in connection with the railway free from the liens of such prior mortgages, and further contriving to injure and defraud your orators and other bondholders of their just rights and for the express purpose of harassing such liens, the said purchasing committee have within the past month procured the entry of an *ex parte* order in the said action in the circuit court of the United States for the eastern district of Missouri allowing said committee to purchase instead of paying and cancelling certain alleged claims against the receivers and the property and decreeing that thereupon the said committee should be subrogated to the rights and priorities of the original creditors whose claims
31 should be so purchased. Your orators are advised that said alleged preferential claims against the receivers and the property amount to over $4,000,000, and by the express terms of the plan of reorganization and the decree of foreclosure the purchasers bought subject to such claims and were to pay off and absolutely extinguish the entire amount as a part of their purchase-money, and before

possession, and thereupon their title and possession was to be subject in all things to the prior liens of your orators and others, and your orators, while denying that any of such claims are prior liens, do charge that such *ex parte* order, recently entered at the request of such purchasers, is in direct repudiation of the original decree and the terms under which said purchase was made and confirmed and can only operate to work a fraud and injury to your orators and other bondholders by allowing such committee to hold such $4,000,000 of claims unextinguished and to set them up as paramount to the liens of the bondholders and thus attempt to enforce a compliance with the present unjust demand of said purchasers that the senior
32 creditors should postpone and partially surrender for the sole benefit of such purchasers and their assigns their existing debts and priorities.

Twentieth. Your orators further show that Humphreys and Tutt, the present receivers of said property, were appointed originally on the *ex parte* application of the insolvent mortgagor corporation, and they are both directors thereof and stockholders to a considerable amount therein, and are also interested in the floating debt and alleged preferential claims of such corporation and are both working in open and constant co-operation with said purchasing committee, and are largely interested in the success of the plans of such committee, which are in direct hostility to the rights and liens of your orators and other bondholders. Said Humphreys is a resident and active business man in the city of New York, and the said Tutt is a banker in active business in St. Louis, and neither of them devote their whole time to the trust of their receivership or give anything but occasional and general attention to the active operation of said property.

Your orators for such reasons charge that they are improper and unfit persons to be appointed receivers in this action, and
33 that the property would be much more economically managed and better financial results would be had from its earnings if the court would appoint a practical and efficient person as sole receiver of the property included in the mortgages east of the Mississippi river, who would devote his whole time and abilities to the management of such an important trust as the operation of several hundred miles of trunk line railway.

Wherefore, and being wholly remediless by the common law, and being relievable only in equity, and such mortgaged property being still in the custody of this court by the receivers appointed as aforesaid, your orators, in behalf of themselves and other bondholders in like relation, with leave of the court first had and obtained, bring this their bill of complaint and ask that due process of law issue against the said Wabash, St. Louis and Pacific Railway Company, James F. Joy, Ossian D. Ashley, Thomas H. Hubbard, Edgar T. Wells, Solon Humphreys, Isaac H. Knox, and Daniel A. Lindley to appear and answer the premises, but without oath, all answers under oath being expressly waived under the rule,
34 and that on the hearing the court will decree that all and singular the railway property, equipment, appur-

tenances, and franchises described in the said mortgages of 1867 and 1879, whether then in existence or thereafter acquired, are subject to the liens thereof as prior liens to any title, rights, or claims of said purchasers, Joy, Ashley, Hubbard, and Wells, acquired under said foreclosure proceedings or by purchase or assignment to them of any alleged claims against the receivers or the railway property; and also that the court will ascertain and decree what particular equipment, machinery, tools, and supplies are covered by and embraced in said two mortgages, or either of them, and the amount of interest which is due and payable upon the bonds which are valid and outstanding under said mortgages or either of them, and also to ascertain and decree what particular bonds are entitled to share in the security afforded by the said mortgage of 1879, and especially will decree that the $400,000 of such bonds now claimed by said purchasing committee were illegally issued and are void, and decree the same to be delivered up by said committee to be cancelled; and will also ascertain how much is due for
35 interest upon the ten underlying divisional first and second mortgages hereinbefore recited, and will thereupon decree that the conditions of said mortgages of 1867 and 1879 have been broken, and that the estate of said original mortgagor and its successors and assigns, including said Joy, Ashley, Hubbard, and Wells, hath been forfeited, and order that unless the amount decreed to be due on such two mortgages shall be paid by a short day that all and singular the lines, equipment, machinery, and tools, appurtenances and franchises especially described in said conveyances or decreed by the court to be covered thereby shall be sold by the master in chancery of this court, subject to the said underlying divisional prior mortgages hereinbefore recited, and that the said original mortgagor corporation and its successors and assigns, and especially the said Joy, Ashley, Hubbard, and Wells and the other stockholders or creditors claiming by or under them, shall be by such sale forever barred and foreclosed of and from any right, title, lien, or equity of redemption in and to the said mortgaged property or any part thereof; and, further, that the court will decree
36 that the proceeds of sale of said property, after payment of costs and expenses, shall be devoted, first, to the payment of all the interest then past due upon any of the said prior divisional mortgage bonds in the order of priority decreed by the court before any payment is made upon the interest or principal of any of the bonds secured by either of the mortgages of 1867 and 1879.

Your orators further pray that, pending the entry of such final foreclosure decree, the court will forthwith appoint some fit person to be the receiver of all the railway property, equipment, appurtenances, and franchises described in said mortgages, with proper orders to hold and administer the same as the officer of this court in this cause, and with specific directions that all the net earnings of said property, after payment of operating expenses, renewals, and taxes, shall be devoted to the payment in the proper and decreed order of priority of all past-due and accruing interest on the said first and second mortgage bonds.

Your orators further pray that the court will grant such further and other relief as may be necessary or proper to fully establish and enforce all the rights and priorities of your orators and other bondholders, and as the court shall be competent to award in the premises.

37 THOMAS B. ATKINS & OTHERS,
Complainants.

HENRY CRAWFORD, *Solicitor.*

[Endorsed:] U. S. circuit court, northern district of Ills. Thomas B. Atkins *v.* The Wabash, St. Louis & Pacific Railway Co. *et al.* Bill.

38 Afterwards, to wit, on the 18th day of December, A. D. 1886, the following order was duly entered on the journal of said court in the above-entitled cause, to wit:

Order Appointing Receiver.

THOMAS B. ATKINS *et al.*
vs.
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*

And now, to wit, on this 18th day of December, 1886, came the above-entitled causes on to be heard upon the application of Thomas B. Atkins, Henry K. McHarg, and other like bondholders, co-complainants, and of Frederick N. Lawrence, Benjamin F. Romami, and Edward Cuthout, as a committee of first-mortgage bondholders, and of John N. A. Griswold and Charles E. Fleming, as a committee of second-mortgage bondholders, and upon the application of others, bondholders secured by mortgages upon the property of the Wabash, St. Louis and Pacific Railway Company executed prior in point of time to June 1, 1880, for the removal of Solon Humphreys and Thomas E. Tutt, present receivers of the property of said railroad company within the State of Ohio, and for the appointment in this cause of Hon. Thomas M. Cooley, of Michigan, as receiver, to take charge of the property and effects, real, personal, and mixed, of the said Wabash, St. Louis and Pacific Railway Company fully set forth and described in the mortgage made and executed by the Toledo, Wabash and Western Railroad Company in the year 1867, and by the Wabash Railway Company in 1879, and by the mortgages prior thereto, covering said property in the possession of or under the control of said Humphreys and Tutt as receivers within the jurisdic-
39 tion of this court; and it appearing to the judge of this court that the said Wabash, St. Louis and Pacific Railway Company and the parties necessary to be notified of this application have received due and timely notice of this motion; and that the said Humphreys and Tutt have been removed as receivers of all the property covered by said mortgages in the States of Illinois and Indiana, and it appearing to this court desirable and necessary for the proper and successful operation of the line of said road, extending from Toledo to the east bank of the Mississippi river, covered by the

said mortgages that the same person should be receiver of all of the said property running through the State of Ohio, Indiana, and Illinois: Now, upon motion of Henry Crawford, for the complainants, Thomas B. Atkins and Henry K. McHarg and certain other bondholders, and Julien T. Davis, Isham and Lincoln and D. H. Chamberlain, of counsel for the Lawrence and Griswold committees of first and second mortgage bondholders, and of counsel for certain first and second mortgage bondholders, and upon the presentation of the orders made in the circuit courts for the southern district of Illinois and the district of Indiana, removing the said Humphreys and Tutt as receivers and appointing Thomas M. Cooley as receiver, and upon the said bill of Atkins and McHarg and the said cross-bills of the Lawrence-Griswold committee-, and the petitions of the said bondholders and complainants and cross-complainants in aid of the motion, and due deliberation being had—

It is hereby ordered, adjudged, and decreed that Solon Humphreys and Thomas E. Tutt, heretofore appointed receivers of
40 the property of the Wabash, St. Louis and Pacific Railway Company within the State of Ohio by an order made and entered in the United States circuit court for the northern district of Ohio on the twenty-ninth day of May, 1884, in a cause brought in said court by the said Wabash, St. Louis and Pacific Railway Company against the Central Trust Company and others, be and they are hereby removed as receivers of the property of the said Wabash, St. Louis and Pacific Railway Company covered by the said mortgages of 1867 and 1879 and the mortgages prior thereto, so far as the same is situated or belongs within the State of Ohio; and it is further ordered, adjudged and decreed that the prayer of the said bill of complaint of Atkins and McHarg and of the cross-bills of the Lawrence and Griswold committees and of the petitions of said bondholders and committees for the appointment of a new receiver in this cause be and the same is hereby granted, and that Thomas M. Cooley be and he hereby is appointed receiver of the said Wabash, St. Louis and Pacific Railway Company and of all its property, personal, real, and mixed, situated within or belonging to the lines of railway in the State of Ohio covered by and embraced in two certain mortgages, one thereof made by the Toledo, Wabash and Western Railway Company in 1867 and the other thereof made by the Wabash Railway Company in 1879, particularly set forth and described in the bill of complaint of said Atkins and McHarg and in the copies of the said mortgages referred to as exhibits to the said bill of complaint, and in the mortgage made and executed by the Toledo and Illinois Railroad Company in 1853, a copy of which said mortgage is referred to as an exhibit in the cross-bill of the said Frederick N. Lawrence *et al.*, and in the mortgage of the
41 Toledo & Wabash Railroad Company made and executed in the year 1858, a copy of which is referred to as an exhibit to the cross-bill of John N. A. Griswold and another, and the said receiver is hereby empowered and instructed to take possession of all of the said property situated within the State of Ohio and belonging to the railway property therein as appurtenant thereto, and to manage,

control, and operate the railroads described in the said mortgage, preserve and protect all said property, and collect as far as possible all accounts, choses in action, and credits due to said company, acting in all things under the orders of this court or, as to property not within this circuit, under the orders of such other courts as may entertain jurisdiction of parts of said property as ancillary to the jurisdiction of this court; and the said receiver is hereby empowered, if necessary, to sue in his own name and to recover all the property, moneys, or earnings of said company covered by the said mortgages, whether real or personal or mixed, and whether in possession or in action, and to retain and employ all necessary attorneys, counselors, agents, laborers, and servants, and to fix and alter the compensation of said necessary attorneys, counselors, agents, laborers, and servants for the due administration of his trust and the performance of his duties hereby imposed upon him, subject to the supervision of the court.

And the said receiver is hereby empowered and directed to defend all suits when, in his judgment, it shall be to the interest of
42 said company or creditors of said company, when said suits shall have been or may hereafter be brought against said company or any property embraced within the terms of this order. Such receiver shall also have authority, subject to the supervision of the court, to make such repairs to said railway or railroads and property, and proper and necessary in his judgment for carrying on the business thereof, and also to make all contracts that may be necessary in carrying on the business of said railroads, subject to the supervision of this court. The said receiver before entering upon his duties shall give his bond, for the benefit of all whom it may concern, in the penal sum of one hundred thousand dollars, conditioned for the faithful performance by said receiver of all his duties as such, and that he will in all things observe and perform the orders of this court now or hereafter to be made, with such sureties and in such form as shall be approved by the judge making this order.

It is further ordered that the said receiver, out of the income which shall come into his hands by the operation of said railroads or otherwise, proceed to make payments as follows:

1st. That he pay all current expenses incident to the creation or administration of his trust and to the operating of said railroads.

2nd. That he pay all amounts now legally due or shall hereafter become due for taxes on any of the property over which he is appointed receiver.

3rd. That he pay all balances due or to become due to other
43 railroads or transportation companies on balances growing out of the exchange of traffic accruing six months prior hereto.

4th. That the said receiver report to this court with all convenient speed what properties he finds under lease to the Wabash, St. Louis and Pacific Railway Company or to Humphreys and Tutt as receivers, with the particulars of said properties and of said leases and the names of the lessors, with the view that this court may direct said receiver with respect to the acceptance of the said leases and their terms or their abrogation, and that until the making of

the said report and the instructions of the court thereon that the said receiver pay all rentals which may hereafter accrue upon all leased lines of said Wabash, St. Louis and Pacific Railway Company within the State of Ohio and the jurisdiction of this court, and for the use of all terminals or track facilities and all such rentals or installments as may fall due for the use of any portion of road or roads or terminal facilities of any other company or companies.

5th. That he pay all rentals to become due upon rolling stock heretofore sold to said railroad company, and particularly paid for and necessary for use in the operation of the road over which the said receiver is appointed covered by any of the existing mortgages described in the bill herein and which comes into the hands of the receiver under the operation of this order; that the said receiver present his said bond to the judge making this order for approval, and that upon said presentation and approval of said bond said receiver is entitled and required to proceed at once with the performance of his duties.

44 It is further ordered, adjudged, and decreed that all parties herein and the said Humphreys and Tutt, their agents, officers, and attorneys, upon being informed of this order and of the approval of said bond by the judge of this court, proceed to surrender upon the 31st day of December, 1886, to the receiver hereby appointed or his duly appointed agent or agents, all of the lines of said railroads embraced within the terms of this order and all the property, real and personal and mixed, including all rolling stock and equipment, choses in action, books, papers, and accounts of said Wabash, St. Louis and Pacific Railway Company in the possession of said receivers or that relate exclusively to the property that is the subject of this order, and said Humphreys and Tutt are permitted to have such inspection and access to the said books, papers, and accounts turned over by them to the receiver hereby appointed, as may be necessary to enable them to make and file the accounts they are hereby ordered to make and file, and the receiver hereby appointed or his agents or employees shall at all times be permitted to make inspection and copies of all the books, papers, accounts, and vouchers kept by said Humphreys and Tutt in the management and operation of any of the property in their charge as receivers, whether in the State of Ohio or elsewhere.

It is further ordered, adjudged, and decreed that after discharging and making all the payments and outgoes required by the terms of this order that the said receiver retain any surplus that may remain in his hands to be applicable to the payment of the past-due and matured interest coupons of the bondholders secured by mortgages upon the
45 said railroad property in the due order of their priorities of lien as may be subsequently directed and ordered by this court; that the said receiver keep such accounts as may be necessary to show the sources from which all such income and revenues shall be derived, with reference to the interests of all parties herein, and the expenditures by him made; that the said receiver proceed with all convenient speed to make and file with the clerk of this

court his inventory of all the property that may be taken possession of by him under the terms of this order, and that he report to this court, from time to time in this cause, once in every month his doings under this decree, and that he and any of the parties to this cause may apply for instructions to this court when necessary. It is further ordered, adjudged, and decreed that the said Humphreys and Tutt do forthwith proceed with all convenient speed, not later than sixty days from the date of the making of this order, to file with the clerk of this court, in the cause of the Central Trust Company against the Wabash, St. Louis & Pacific Railway Company, consolidated case, as far as practicable, a just and true account of all their acts and doings as receivers aforesaid with respect to the property east of the Mississippi river embraced within the mortgages of 1879 from the date of their appointment, including a just and true inventory of all the property, real, personal, and mixed, taken possession of by them as such receivers in the State of Ohio.

The following is a more particular and detailed description of the property that is the subject of this order, over which the said
46 receiver is hereby appointed, and of which he is directed to take possession, to wit, that portion within the State of Ohio of all the railroad, road-bed, and right of way extending from the city of Toledo, in the State of Ohio, to and through the State of Indiana, and thence in the State of Illinois to Meredosia, with branch of said railroad to Naples and East Hannibal, and from Meredosia to Camp Point, in the State of Illinois, and with branch of said railroad from Clayton to the east bank of the Mississippi river at Hamilton, in said State, and with branch of said railroad leading from Decatur, in said State, to East St. Louis, in said State, together with all the embankments, bridges, turn-outs, side tracks, buildings, water tanks and fixtures, shops, engines and other houses, depots, turn-tables, engines, machinery, cars, tools, rolling stock, blocks, land, buildings, and offices and other things, real and personal, now owned and used or that may be owned or used hereafter in connection with the said railroad and the appurtenances thereof, and all the power, privileges, franchises, and charter or other rights of the said Wabash, St. Louis and Pacific Railway Company with respect thereto, together with all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, and all reversions, remainders, tolls, incomes, rents, issues, and profits thereof, and all contracts, lease rights, now existing between the said Wabash, St. Louis and Pacific Railway Company or Humphreys and Tutt, receivers, with other corporation-, companies, or individuals, and all the estate, right, title, interest, and demand, as well at law as in equity, of the said railway company in and to the same and every part thereof, with the said appurtenances, in-
47 cluding all moneys, books, papers, accounts, or choses in action in the hands of any and all agents, clerks, or officers of the present receivers and of all persons indebted to said receivers or to the trust, intending hereby to direct and require the receiver hereby appointed to take into his possession as the officer of this court all and singular the railway property of every kind, real, per-

sonal, or mixed, whether in possession or in action, covered by said mortgages or any of them within the State of Ohio.

48 Afterwards, to wit, on the 8th day of June, 1888, the following application for leave for Adam Kohn to file intervening petition was filed in the above-entitled cause, to wit:

Application for Leave for Kohn to File Intervening Petition.

Circuit Court of the United States, Northern District of Ohio, Western Division.

THOMAS B. ATKINS *et al.*
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.* } Equity. No. 540.

Before the Hon. Howell E. Jackson, judge.

Now comes Adam Kohn, by Hamilton & Ford, his attorneys, and represents to the court that in the month of July, 1887, while in the employ of the receiver of said railway as a switchman at Toledo, Ohio, he sustained injuries in the loss of a portion of his right arm, and that he believes he has a good cause of action against said receiver therefor, and he respectfully moves the court for leave to file his intervening petition herein within one week, and that the same may be referred to Augustus J. Ricks, special master in this case, to take testimony and report the same and his findings and conclusions thereon to this court.

ADAM KOHN,
By HAMILTON & FORD, *Att'ys.*

49 Afterwards, to wit, on the 8th day of June, 1888, the following order was duly entered on the journal of said court, to wit:

Leave for Kohn to File Intervening Petition.

Upon application, it is ordered that Adam Kohn has leave to file his intervening petition in this cause against the receiver, John McNulta, within one week, setting forth his claim for injuries caused by the alleged negligence of said receiver and his agents, as stated in his application this day filed, and that a copy of said petition and a copy of this order be mailed to said receiver, and that he file his answer thereto on or before July 15th, 1888, and that the matter in controversy made by said petition and answer be referred to A. J. Ricks, as special master, on account of his experience in matters of such accounting, who shall as speedily as practicable hear testimony and make a report as to what, if any, damages said Adam Kohn should be allowed for the injuries complained of, and said special master, for the purposes of said hearing, is hereby invested with all the powers conferred upon masters in chancery by the rule of the Supreme Court of the United States, and he is authorized to

hear testimony at any point and place he may deem most convenient for the parties interested and cause witnesses to be subpœn-ed at such places as he may deem best, convenience and cost to the parties considered.

Afterwards, to wit, on the 12th day of June, 1888, the following intervening petition of Adam Kohn was filed in the above-entitled cause, to wit:

Intervening Petition of Kohn.

Circuit Court of the United States for the Western Division of the Northern District of Ohio.

50 THOMAS B. ATKINS *et al.*
vs.
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*

Now comes Adam Kohn and asks to be made a party interpleading in this cause, and represents that on the 17th day of December, 1886, the above-entitled suit was commenced in said court and such proceedings were had by appearance of parties and consent of counsel that the said court had jurisdiction to appoint a receiver of the Wabash, St. Louis & Pacific Railway Company, its property, real and personal, and its franchises extending from its terminus in Toledo, Ohio, to the State line of Ohio and situated within or belonging to the lines of railway in the State of Ohio covered by and embraced in two certain mortgages, one thereof made by the Toledo, Wabash and Western Railway Company in 1867, and the other thereof made by the Wabash railway described in said mortgage, and the said court upon the 18 day of December, 1886, appointed Thomas M. Cooley, of Michigan, receiver of the said Wabash, St. Louis and Pacific Railway Company and of all its property, real and personal and mixed, covered by said mortgages, with power to preserve and protect all said property and collect as far as possible all accounts, choses in action, and credits due to said company, acting in all things under the order of this court, and the said receiver is hereby empowered, if necessary, to sue in his own name and to recover all the property, moneys, and earnings of said company covered by the said mortgages, whether real, personal, or mixed and whether
51 in possession or in action, and to retain and employ all necessary attorneys, agents, laborers, and servants, and to fix and alter the compensation of said necessary attorneys, conductors, agents, laborers, and servants for the due administration of his trust and the performance of his duties hereby imposed upon him subject to the supervision of the court.

And the said receiver is hereby empowered and directed to defend all suits when in his judgment it shall be to the interest of said company or creditors of said company when said suits have or may hereafter be against said company or any property embraced within the terms of this order; such receiver shall also have authority, subject to the supervision of the court, to make such repairs to said

railway or railroads and property *and* proper and necessary in his judgment for carrying on the business thereof, and also to make all contracts that may be necessary in carrying on the business of said railroads, subject to the supervision of this court. The said receiver before entering upon his duties shall give bond for the benefit of all whom it may concern in the penal sum of one hundred thousand dollars, conditioned for the faithful performance *of* by said receiver of all his duties as such, and that he will in all things observe and perform the orders of this court now or hereafter to be made, with such sureties and in such form as shall be approved by the judge making this order. It is further ordered that the said receiver, out of the income and of the income which shall come into his hands by the operation of said railroads or otherwise, proceed to make payments as follows:

First. That he pay all current expenses incident to the crea-
52 tion or administration of his trust and the operating of said railroads. The following is a more particular description of the property that is the subject of this order over which the said receiver is hereby appointed and of which he is directed to take possession, to wit:

That portion within the State of Ohio of all the railroads, roadbed, and right of way extending from the city of Toledo, in the State of Ohio, to and through the State of Indiana, and then in the State of Illinois to Meredosia, together with all the embankments, bridges, turn-outs, side tracks, buildings, water tanks and fixtures, shops, engines and other houses, depots, turn-tables, engines, machinery, cars, tools, rolling stock, blocks, lands, buildings, offices, intending hereby to direct and require the receiver hereby appointed to take into his possession, as the officer of this court, all and singular the railway property of every kind, real, personal, or mixed, whether in possession or in action, covered by said mortgages or any of them, within the State of Ohio; all of which appears by the orders of said court as entered on the journal thereof, to which reference is hereby made.

In pursuance of said order said Thomas M. Cooley entered upon the discharge of said trust, having first duly qualified therefor, as provided in said order, and continued to discharge the same down to the 6th day of April, 1887, when, he having resigned, John McNulta was appointed by this court receiver in the place of said Cooley, with like powers and authority and qualifications, and thereby became and was by said court clothed with all and singular the authorities and control of the property and franchises of said railroad as was conferred upon said Thomas M. Cooley, as hereinbefore set forth.

53 On the 11th day of July, 1887, while the said John McNulta, as such receiver, was in possession of the property and franchises of said railroad and engaged in the operation of said road, the complainant, your petitioner, was in the employ of such receiver at Toledo, Ohio, and on the part of said railway so in charge and operation of said receiver as a switchman on the middle grounds in Toledo, and it then and there became and was the duty

of the complainant, under his said employment, to go between cars as trains were being made and broken up, to couple and uncouple cars, and it was then and there the duty of said receiver to furnish for the complainant safe and suitable appliances and means for coupling cars so that the same could be done with safety to himself in the discharge of such duty; that the freight cars generally in use and on said road by said receiver were supplied with draw-bars, so constructed as to dispense with what is known as "deadwoods" on said cars.

Complainant, at the said date, had a limited knowledge of and experience in the business of switching and coupling cars, having had only three months' experience therein; that he entered the service aforesaid on or about the 29th of March, 1887, and while said railroad was in the charge and operation of Thomas M. Cooley, receiver, as hereinbefore stated, prior to which date he was wholly without any experience in the business of railroading or any of the branches of labor connected therewith, and especially that of switching and coupling cars, as said receiver, his agents and servants in authority over him, were informed and well knew at the time complainant entered said employment, and all the knowledge and experience complainant had or possessed on said 11th
54 day of July, 1887, in the business of switching and coupling cars was *required* between said 29th day of March and 11th day of July, 1887, as the said John McNulta, receiver, his agents and servants superior in authority over complainant, well knew and understood, and during said time complainant had little or no knowledge of the use and dangerous nature of the act of coupling cars constructed with deadwoods, so called, as hereafter referred to, and the said McNulta, receiver, his agents and servants in authority over complainant, well knowing complainant's want of knowledge and inexperience in that regard, wholly neglected and failed to inform complainant of the danger connected with coupling cars so constructed, or to do anything in any manner — warn complainant against such danger, or instruct or inform him in any way how to look out for or avoid the same in the discharge of his aforesaid duties in coupling cars, as it was their duty under the circumstances to do. Complainant further says that the cars generally in use by the said receiver on said road, with use of which complainant was familiar, were constructed with draw-bars of the same or about the same height, which were much easier to couple and attended with less danger than coupling the cars when there was a marked difference in the height of the draw-bars.

On said 11th day of July, 1887, it became the duty of and complainant was ordered *to* by his superiors to make a coupling between two of said receiver's cars in use and then engaged in operating said railroad; said cars were constructed with large deadwoods on each side of the draw-bars, with the nature and danger of which complainant was then unaware; the draw-bars in said cars
55 were of an uneven height, one being four or five inches lower than the other, making it more difficult and dangerous to effect the coupling, all of which was well known to said receiver,

his agents and servants, and unknown to complainant at the time he went between said cars to make said coupling. Complainant avers that said receiver, his agents and servants, were guilty of negligence in putting into said train said cars constructed with said deadwoods, and consequently unusual in use and dangerous, and said draw-bars in the dangerous condition hereinbefore described, and in ordering and requiring complainant, with his limited experience and want of knowledge of the dangers incident to said act, without any warning or information or instructions as to the same and without any appliances or implements being furnished him to avoid danger to himself in the discharge of his aforesaid duty, to couple said cars. When the draw-bars of said cars came together, owing to the difference in the height of the same, it became and was more difficult to make said coupling than the cars complainant had been accustomed to couple and required more time, and while complainant was in the act of making said coupling and in the use of all proper care and caution on his part and the use of all knowledge on his part of which he was then possessed and without his fault said deadwoods and said cars came suddenly together and caught complainant's right arm between the hand and elbow and so crushed, mangled, and mutilated the same *so* as to completely destroy that part of his arm and render amputation of the same and consequent loss of his right hand necessary, and the same was in consequence soon thereafter amputated.

56 Complainant says he, in consequence of such injury, became sick, sore, and disabled, and suffered great bodily pain and anguish, was confined to his home for the space of six weeks, wholly unable to do any work, and incurred large indebtedness and expenditures for medicine and medical and surgical attention in being cured of said injury, and he is thereby permanently crippled and the use of his right arm nearly destroyed, and by the loss of his right hand its usefulness is greatly and permanently impaired.

Complainant says he sustained said injury without any fault of his own and in consequence of the negligence of said receiver, his agents and servants, in putting and keeping him at such dangerous work and occupation without experience and knowledge, as he was without any instructions, directions, or warning as to the danger of the same, and without furnishing him any appliances or facilities for doing the same with safety and in receiving and taking into his control and putting into his train for complainant to couple cars of unusual and dangerous construction and not generally in use without notice or warning to complainant of the same, and in suffering and permitting cars with the draw-bars in the condition hereinbefore described to be used and put into his train of cars.

Complainant says he has suffered damages in the premises and, in consequence of said injuries, in the sum of ten thousand dollars. He therefore asks that the court will make such order herein as law and equity may require for the purpose of ascertaining what his damages are and to provide compensation therefor.

HAMILTON & FORD,
Sol's for Petitioner.

57 STATE OF OHIO, } ss:
Lucas County, }

Adam Kohn, being duly sworn according to law, deposes and says that the facts stated in the foregoing petition are true, as he believes.

ADAM KOHN.

Sworn to before me and subscribed in my presence this 12th day of June, 1888.

[SEAL.] CHAS. F. WATTS,
Notary Public.

58 Afterwards, to wit, on the 26th day of June, A. D. 1888, the following motion was filed in the above-entitled cause, to wit:

Motion for Kohn to Give Security for Costs.

Circuit Court of the United States, Northern District of Ohio, Western Division.

THOMAS B. ATKINS *et al.*
vs.
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*

Motion by receiver for an order requiring Adam Kohn, intervener, to give security for costs.

Now comes John McNulta, receiver, and moves the court for an order that Adam Kohn, an intervener herein who has filed his petition by leave of court, be required to give security for the costs which may be incurred in the trial of the issues to be made between the parties.

By OSBORN & SMITH,
Sol's for Receiver.

Afterwards, to wit, on the 29th day of June, 1888, the following order was duly entered on the journal of said court, to wit:

Motion for Kohn to Give Security for Costs Sustained.

This cause came on to be heard upon the motion of the defendant for Adam Kohn, intervening petitioner, to give security for costs, and the court, being fully advised in the premises, does sustain said motion, whereupon it is ordered that said intervening petitioner give security for costs on or before August first.

59 Afterwards, to wit, on the 27th day of June, 1888, the following motion was filed in the above-entitled cause, to wit:

Motion to Set Aside Order of Reference.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THOMAS B. ATKINS *et al.*
vs.
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*

Motion to set aside order of reference to master on intervening petition of Adam Kohn.

Now comes Adam Kohn, complainant herein, by intervening petition and moves the court to set aside the order heretofore made herein as to his intervening petition, by which the matters therein referred to were referred to Augustus J. Ricks as master, and to order that the issues raised upon said intervening petition and all matters of fact arising thereon be submitted to the regular jury of this court.

ADAM KOHN,
By HAMILTON & FORD, *Solicitors.*

Afterwards, to wit, on the 29th day of June, 1888, the following order was duly entered on the journal of said court, to wit:

Order of Reference Set Aside, &c.

This cause came on to be heard upon the motion of the intervening petitioner, Adam Kohn, to set aside the order of reference heretofore made herein and for an order that the issues raised upon said intervening petition and all matters of fact arising thereon be submitted to the regular jury of this court; and the court, being fully advised in the premises, does order that said order of reference be set aside, and that said intervening petition be tried *to* a jury.

60 Afterwards, to wit, on the 14th day of July, 1888, the following answer of receiver to intervening petition of Adam Kohn was filed in the above-entitled cause, to wit:

Answer of Receiver to Intervening Petition of Kohn.

The United States Circuit Court, Northern District of Ohio, Western Division.

THOMAS B. ATKINS *et al.*
vs.
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*

Answer of receiver to intervening petition of Adam Kohn.

Now comes John McNulta, receiver herein, and for answer to so much of the intervening petition of Adam Kohn, herein filed, as he

is advised by counsel it is necessary for him to respond unto says that he admits that on and prior to the 11th day of July, 1887, the said Adam Kohn was in his employ as a switchman in the railway yard of said Wabash railway, in the city of Toledo, and that it was a part of the duty of said Kohn to couple and uncouple cars. Respondent says that said Kohn had been in his employ as such switchman for about the period of three months prior to said 11th day of July, 1887. Respondent denies that prior to said day said complainant was wholly without any experience in the business of railroading and especially that of coupling and uncoupling cars, and denies that respondent or his agents and servants in authority over said complainant were informed and knew what experience in said business the complainant had at the time he entered into the employment of respondent, or that they had any knowledge that said complainant during the time he was in said employment
61 had little or no knowledge of the dangerous nature of the act of coupling cars constructed with deadwoods, as set forth in the petition. On the contrary, respondent avers that said complainant during all of said period had ample opportunity to learn and know, and that he was, in fact, informed and knew, of such danger, which was inseparable from his regular employment.

This respondent says that it was no part of his duty to warn or instruct the complainant of such danger; that such danger was an open and apparent one to any one who should attempt to make a coupling of cars provided with such deadwoods.

Respondent says that in the transaction of the railway business entrusted to him it is and was in the year 1887 necessary to receive and transport over his railway cars of a large number of different railway and transportation companies, which cars differ largely in make and construction; that a large proportion of said cars are provided with deadwoods such as were upon the cars by which complainant was injured, and that in the railway yard of this receiver at Toledo it was necessary to do a large amount of switching, coupling, and uncoupling of such cars, as said complainant was informed and well knew at the time of his injury.

It is true that the deadwoods upon said cars differed in construction from those provided upon the cars belonging to said Wabash railway in the possession of respondent, but respondent denies that the draw-bars in the two cars by which complainant was injured were of different heights or of a different height from those of the cars ordinarily in use upon the railway operated by respondent. This respondent denies that he or any of his servants or employees were guilty of any negligence in regard to any of the matters
62 and things complained of in the petition; and respondent denies that said complainant was himself without fault in the premises, but alleges, on the contrary, that his said injury was caused solely by the negligence, want of caution, and ordinary care on the part of said complainant in making said coupling. As to the extent of the injuries sustained by complainant this respondent has no knowledge save from the averments of the petition, and therefore denies all of the statements and averments of the petition in refer-

ence thereto. Respondent further denies all and singular the allegations of the petition not expressly herein admitted to be true.

Wherefore respondent prays that the petition of the complainant may be dismissed at the costs of said intervenor and for all proper equitable relief.

OSBORN & SMITH,
Sol's for John McNulta, Receiver.

Afterwards, to wit, on the 3rd day of September, 1888, the following reply to answer of receiver was filed in the above-entitled cause, to wit:

Reply to Answer of Receiver.

United States Circuit Court for the Northern District of Ohio, Western Division.

THOMAS B. ATKINS *et al.*
vs.
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.* } Reply.

Adam Kohn, intervening petitioner herein, by way of reply
63 to the answer of John McNulta, receiver, to his intervening petition herein, says he denies that he had ample opportunity to learn and did learn and know the danger attending the coupling of cars constructed as those mentioned in the petition, or that he was, in fact, informed of the same, but, on the contrary, he was inexperienced in the business of coupling cars generally, and especially the kind of cars causing his said injury. He denies that it was no part of the duty of said McNulta to warn him of such danger, and he denies that such danger was an open and apparent one. He denies that a large proportion of the cars in use by said McNulta on his said road are or were provided with deadwoods such as were on the cars by which complainant was injured, and that at the railway yards of this receiver, at Toledo, it was necessary to do a large amount of coupling and uncoupling of such cars, as said complainant was informed and well knew at the time of his injury. He denies that complainant's said injury was caused solely by the negligence, want of caution, and ordinary care on the part of said complainant in making said coupling or otherwise.

HAMILTON & FORD,
Solicitors for Complainant.

STATE OF OHIO, } *ss:*
Lucas County, }

Adam Kohn, being duly sworn according to law, deposes and says that the facts stated in the foregoing reply are true, as he verily believes.

ADAM KOHN.

Sworn to before me and subscribed in my presence this 25th day of August, 1888.

[SEAL.]

M. G. BLOCH,
Notary Public, Lucas Co.

64 Afterwards, to wit, on the 5th day of December, 1888, the following motion was duly filed in the above-entitled cause, to wit:

Motion to Strike from Files Reply of Kohn.

United States Circuit Court, Northern District of Ohio, Western Division.

THOMAS B. ATKINS *et al.*
vs.
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*

Now comes John McNulta, receiver herein, and moves the court to strike from the files the reply filed herein by Adam Kohn, intervening petitioner herein, to the answer of the receiver to the intervening petition of said Kohn, and shows for cause that the same was filed without leave of court and out of rules.

OSBORNE & SMITH,
Sol's for Receiver.

Afterwards, to wit, on the 17th day of December, A. D. 1888, the following entry was duly made on the journal of said court, to wit:

Trial and Verdict.

This day came the parties, by their counsel, and came also a jury, to wit, Stephan Lapham, D. J. Harris, Hiram Thomas, Leonidus Chapin, Peter Kimler, E. T. Kellam, H. Leaders, Ulrich Ball, R. P. Hollington, Thomas Cook, Samuel Galloway, and John H. Pack, who were accepted and duly impannelled and sworn well and truly to try the issues joined between the parties. Evidence was offered and closed, arguments of counsel were submitted and concluded, and the jury, having received their instructions from the court,
65 retired in charge of the marshal for deliberation; and after a time said jurors returned into court and do say:

"We, the jury in this case, being duly impannelled and sworn, do find for the plaintiff and do assess his damages *to* the sum of ten thousand dollars.

LEONIDUS CHAPIN, *Foreman.*"

Afterwards, to wit, on the 18th day of December, A. D. 1888, the following motion for a new trial was duly filed in the above-entitled cause, to wit:

Motion for New Trial.

United States Circuit Court, Northern District of Ohio, Western Division.

THOMAS B. ATKINS *et al.*
vs.
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*

And now comes John McNulta, receiver herein, by Osborn & Smith, his attorneys, and moves the court to set aside the verdict of the jury herein impanelled to try the issues arising upon the intervening petition of Adam Kohn herein filed, and shows for cause:

First. That no cause of action is set forth in said intervening petition.

Second. That the verdict of the jury is contrary to the law of the case.

Third. That the verdict of the jury is unsustained by the evidence.

Fourth. That the verdict of the jury is contrary to the evidence.

Fifth. That the damages awarded by the jury are excessive.

66 This receiver therefore prays that the court will render a judgment upon the evidence in favor of this respondent or grant him a new trial herein or make such order upon said intervening petition as to the court shall seem equitable and proper in the premises.

OSBORN AND SMITH,
Attorneys for Receiver.

Afterwards, to wit, on the 2nd day of February, 1889, the following order was duly entered on the journal of said court, to wit:

Verdict Set Aside. Appeal Allowed.

Adam Kohn having been heretofore allowed to file his intervening petition in this cause, and having also been allowed to submit his claim for personal injuries sustained to a trial jury, and said jury having awarded said Kohn upon said trial damages to the sum of $10,000, and the receiver having filed his motion to set aside said verdict and for a new trial, now, this day, came the parties, by their counsel, and said motion was argued by counsel, and upon due consideration it is ordered that said verdict be set aside, and that the intervening petition of said Adam Kohn be dismissed and his claim for damages be disallowed; to which order and ruling of the court said Kohn excepts, and from said order prays an appeal to the next term of the Supreme Court of the United States, which is allowed and bond for appeal is fixed at $250.00.

67 Afterwards, to wit, on the 4th day of February, 1889, the following order was duly entered on the journal of said court, to wit:

Bill of Exceptions Allowed.

On motion of the intervening petitioner, Adam Kohn, it is ordered that he has leave to file his bill of exceptions taken to proceedings had in this case during the trial to the jury upon his claim for damages, which is allowed, and said bill of exceptions is thereupon signed and sealed by the court and ordered to be filed herein, which is accordingly done.

68 Afterwards, to wit, on the 4th day of February, A. D. 1889, the following bill of exceptions was filed in the above-entitled cause, to wit:

Bill of Exceptions.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THOMAS B. ATKINS *et al.* *vs.* THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*	Hearing on Intervening Petition of Adam Kohn.

Be it remembered that on the trial of the above-entitled cause, at the December term, 1888, before Hon. Martin Welker, judge of said court, and a jury duly empanelled and sworn therein, plaintiff, to maintain the issues on his behalf, called as a witness JAMES A. DUNCAN, who, first being duly sworn, testified as follows:

Testimony of Jas. A. Duncan.

Direct examination by Mr. FORD:

Q. You are a physician, are you, Doctor?
A. Yes, sir.
Q. Do you know this young man, Kohn?
A. Yes, sir.
Q. Do you remember being called to attend him in July, 1887?
A. Yes, sir.
Q. What date was it?
A. July 11th, 1887.
Q. Did you assist in taking his arm off?
A. I did, sir.

The COURT:

Q. Was it necessary to do it?
69 A. Yes, sir; in my opinion.

Mr. FORD:

Q. Where was it taken off?
A. Just below the elbow joint.
Q. How long was he laid up?

A. I don't know. I had nothing to do with the case after the first day.

Q. Did you think that in the condition that the arm was in that amputation was necessary?

A. Yes, sir; I did.

The COURT: I take it that is a presumption that they wouldn't take it off unless it was necessary.

WITNESS: We didn't do it for fun.

The COURT:

Q. What was your bill?
A. The company paid me for the first day's service.
Q. You are in the employ of the company?
A. Yes, sir.
Q. You were at that time the surgeon of the Wabash road?
A. Yes, sir.
Q. You don't know how much a job of that kind costs?
A. It depends upon their ability to pay.

Mr. FORD:

Q. How many doctors did you have?
A. I didn't have any.
Q. How many participated?
A. Two others besides myself.

The COURT:

Q. You had somebody to assist you?
70 A. Indirectly; yes, sir.

Cross-examination by Mr. SMITH:

Q. You were paid by the Wabash Railway Company?
A. Yes, sir.

The COURT:

Q. You didn't make any bill against the plaintiff?
A. No, sir.

Testimony of Adam Kohn.

Plaintiff ADAM KOHN, further to maintain the issues on his behalf, was himself sworn, and testified as follows:

Direct examination by Mr. FORD:

Q. What is your name?
A. Adam Kohn.
Q. How old are you?
A. I will be twenty-six years old the fourth of next March.
Q. When did you go into the employ of this railroad company?
A. The 29th day of April, 1887.
Q. Had you ever had any experience in railroading before?
A. No, sir.

Q. Who employed you?
A. Ed. Clark.
Q. Who was Edward Clark?
A. Night yardmaster.
Q. What information did you give him at the time as to whether you had ever had any experience in railroading or not?
A. I told him I had never railroaded a day in my life.
Q. What did he say to that?
71 A. He said, "Do you intend to try?" I said, "I can't do any more than to try." Then I went home to supper; when I went back he took my dinner pail and set it down there and told me to go up in the yard and do as I was told—up in the yard opposite the round-house.
Q. Who set you to work?
A. William Butler, the pony conductor.
Q. What did you go to work at?
A. Coupling cars.
Q. Was that the first work you did?
A. Yes, sir.
Q. What day of the month was that?
A. The 29th day of April, 1887.
Q. What did you go to work as, night or day man?
A. Night man.
Q. And from that time where did you continue to work?
A. Right there in the same place. I worked extra for a while; I can't say how long I did work extra; I may have worked a week extra and may have worked two weeks extra.
Q. What do you call that working extra?
A. When some of the steady men were off.
Q. When you were working regularly how many hours a day did you put in?
A. I was supposed to get to work at half past six and work till half past six.
Q. They put you at night work the first thing?
A. Yes, sir.

The COURT:

Q. What time did you go to work?
72 A. At half past six.

Mr. FORD:

Q. And during that time what work did you do?
A. Coupling cars.
Q. Whereabouts; at this same place?
A. Yes.
Q. How did you get your directions or instructions what to do?
A. I didn't get any.
Q. Who told you where to work or what to do and how to do it?
A. Nobody.
Q. How did you know where to go to work?
A. He told me to go up there and do as I was told.

Q. After you got started what did you do?
A. The same as the other helpers.
Q. What instructions, if any, did you get as to how to manage your work?
A. I didn't get any.
Q. What instructions did you get, if any, about how to couple cars or to do this work?
A. None at all.
Q. At any time?
A. No, sir.
Q. You worked regularly up to what time?
A. To the eleventh day of July.
Q. And that is the day you were hurt?
A. Yes, sir.
Q. What time in the day was it?
A. Between four and half past four in the morning.
Q. Where was it?
73 A. Up near the round-house, in what they call the old yard.
Q. What were you doing at the time?
A. I was making a coupling when I got hurt.
Q. Onto what?
A. Onto a Merchants' Dispatch.
Q. Where did that train come from?
A. From Andrews.
Q. Where is that?
A. On the Wabash road.
Q. It came in on the Wabash road?
A. Yes, sir; in train number 58.
Q. Was this the main track or the side track that it was on?
A. It came there into the yard.
Q. Who set you to work at that?
A. That was our duty to break up trains. After we got the new trains made up we had to go over to the old yard and break up old trains. I had to go along with the pony.
Q. Where was this car and how was it standing?
A. The Merchants' Dispatch was standing there. If I recollect right, it was alongside of seven more. It was coupled onto seven other cars and the engine had hold of the Central Railroad of New Jersey car, and Billy Butler, the conductor, cut off one car and I got left on that and rode it down into the yard. I got off and he walked by a couple and I stepped in to make it and got my arm fast.
Q. You say the Merchants' Dispatch was hitched onto how many cars?
A. Seven.
Q. What kind a draw-bar did that have?
74 A. A patent coupler—what the switchmen called a bull-tongue link.
Q. About how long was the link?
A. It was supposed to be the same length as the others.

Q. How long was it, if you know at all?
A. About ten inches.
Q. In that patent coupler?
A. Yes, sir.
Q. And that was stationary, was it?
A. Yes, sir.
Q. And this New Jersey Central, was it attached to the engine?
A. Yes, sir.
Q. How far away from you was it when you saw it coming down?
A. It was within about a car length. I see it right along all the time, and the pony conductor walked by the coupling and that left it for me to couple.
Q. His name was Billy Butler?
A. Yes, sir.
Q. When it came down what did you find out about it?
A. I see that it had a big deadwood on it.
Q. What did you find out about the draw-bars?
Q. When it got so close I see that the draw-bar was so much higher than the draw-bar of the Merchants' Dispatch that it had to be raised up.
Q. Which draw-bar was the higher?
A. The Central Railroad of New Jersey.
Q. That was the approaching car?
A. Yes, sir.
75 Q. How much higher was it than the other car?
A. Four inches.
Q. The link was in the stationary car?
A. Yes, sir.
Q. How did you have to make that coupling?
A. I had either to get my arm below the deadwood or else above it.
Q. Suppose the deadwood was not there, what would you have to do to it?
A. Change the link.
Q. Why?
A. Because one draw-bar was higher than the other.
Q. How did that make any difference?
A. It wouldn't let the pin drop.
Q. How is it when the draw-bars are on the same level? What do you have to do with the link—any change?
A. No, sir. All you have to do is just to enter it.
Q. If the draw-bars are four or five inches different in height, what do you do?
A. Change it.
Q. What else do you have to do?
A. To raise up the link. If the draw-bar is so much higher, you have to raise up the stationary link.
Q. What did you do in this particular case?
A. I had to raise up the link so as to make the coupling.
Q. Where did you have to stand in doing that?

A. I had to stand at the end of the Merchants' Despatch, between the two cars.

Q. Which hand did you raise the link with?

76 A. The right hand.

Q. What were you in the act of doing when this deadwood came down?

A. Raising up the link.

Q. Had you yet got the link into the draw-bar?

A. Yes; I had the link into the draw-bar.

Q. Do you remember whether or not the pin had got into its place before your arm was caught?

A. No, sir; the pin hadn't dropped.

Q. What was it that caught your arm, so far as you can state?

A. The deadwoods.

Q. Which deadwoods?

A. The deadwoods of the two cars; my hands didn't have a scratch on it.

Q. Did your other arm have any scratch on it anywhere except——

A. No, sir; only just below the elbow, where it was mashed.

Q. Describe to the jury as near as you can the deadwood on the New Jersey Central car.

A. (Witness refers to the model produced in court by the defendant.) That is about the shape of them, only, if I am not mistaken, they go down lower than they are there.

Q. What is this deadwood here (pointing)?

A. Them are about the same.

The COURT:

Q. Show the jury how you reached over to put this pin in, as far as you can.

77 A. I got my hand in here to raise the link up into this draw-bar.

Mr. FORD (referring to models):

Q. I suppose this is the Merchants' Dispatch car?

A. Yes.

Q. And suppose this is the one coming down?

A. Yes.

Q. And you stood where?

A. Right here (pointing). I stood on this side and had hold of the link with my right hand.

Q. You said the difference in height of these draw-bars required what?

A. To raise the link up.

Q. In order to get it into the higher draw-bar?

A. Yes, sir.

Q. If they both had been on a level they would have gone in without raising?

A. Yes, sir.

Q. And where was your arm?

A. Right in here (points).
Q. And this came down onto it?
A. Yes.
Q. Is that about the way the old New Jersey Central is constructed?
A. Yes; it is.
Q. And this seems to be a smaller deadwood?
A. Yes.
Q. Representing the Merchants' Dispatch?
A. Yes.
Q. You had been at work in the railroad business how long?
A. Two months and thirteen days.
Q. And during the time that you had been employed in these yards what cars had you handled mostly?
A. Mostly Wabash cars.
Q. Your business was to break up these trains that came in over the Wabash line?
A. Yes, sir.
78 Q. Did you switch for any other railroad company except the Wabash?
A. No, sir.
Q. What, if anything, did you have to do with foreign cars except as they came over the Wabash road?
A. None at all.
Q. Did the Wabash cars have any deadwoods at all on them?
A. No, sir; not that I seen.
Q. How were they constructed?
A. Just with a draw-bar.
Q. Just with a draw-bar?
A. Yes, sir.
Q. Had you ever seen one of these big New Jersey Centrals before?
A. Not that I remember of.
Q. What did you know about other cars with deadwoods on them?
A. None at all.
Q. Had you coupled some of them?
A. I may have couplod one or two, and may have coupled five.
Q. To these small deadwoods?
A. Yes.
Q. What do you say to the jury as to whether you ever undertook to couple one of these big things before?
A. No, sir; not that I can remember of.

A JUROR:

Q. Was it a straight or a crooked link?

Mr. FORD:

Q. This link, you say, the boys called a bull-tongue link?
A. Yes, sir.
Q. Was it straight or crooked?

A. A straight link.
Q. You say about ten inches long?
A. Yes, sir; the link was longer, but the other part of it was in the draw-bar.
79 Q. Do you know anything about these cars coming together—to tell which comes together first—whether the link comes into the draw-bar first or after the deadwoods come together?
A. The link comes into the draw-bar first.
Q. With these big deadwoods?
A. Yes, sir.
Q. How much first?
A. Well, about six inches.
Q. I am asking whether you know.
A. I say about six inches.
Q. With these kinds of deadwoods?
A. Yes, sir.
Q. About six inches?
A. Yes.
Q. How do you get at that if you never coupled one of them?
A. You have to raise the link up.
Q. How do you get at it if you never coupled them together?
A. I never coupled them two big deadwoods together.
Q. How do you come to state how they came together?
A. They have to come together that way.
Q. Are you stating what you know or what you guess?
A. I don't know nothing at all about it.
Q. In these smaller deadwoods with this kind of a car, how would you put your hand in to make the coupling?
A. Below.
Q. Is that about the way it stands with reference to that matter?
A. Yes; the top of the draw-bar is just about on a level with the bottom of the deadwood.

The COURT:

Q. Did you put your hand over?
A. No, sir; I had it right——
80 Q. You put it right where the bumper hit you, but didn't you undertake to put your hand over?
A. No, sir; I tried to do it underneath.

Mr. FORD:

Q. Tried to do it underneath; and this came down so far that it caught your arm?
A. Yes, sir.
Q. I wish you would tell the jury about how frequently you met with these cars that had deadwoods on at all during the two months and thirteen days you were at work for the company; not these big New Jersey Central cars, but the other kind.
A. I didn't meet with but very few.
Q. How many is a very few, would you say?
A. I don't believe I saw one a week.

Q. Where was Billy Butler?
A. About half a car ahead of me.
Q. Where were you taken after you were hurt?
A. Down to the office.
Q. And then sent home, were you?
A. Yes; they took me home with the Wabash pony.
Q. And the doctors took your arm off, did they?
A. Yes.
Q. How long were you laid up after the injury?
A. About six weeks.
Q. Six weeks confined to your bed?
A. No, sir.
Q. How long were you confined to your bed?
A. I was to bed pretty near a week.
Q. You were confined to the house, you say, six weeks?
A. Yes, sir.
Q. Before you went into railroading what had been your occupation?
A. Helping in a blacksmith's shop.
81 Q. What kind of work was that?
A. Blacksmithing; welding iron.
Q. Did it require one or both hands?
A. Both hands.
Q. How long had you worked at that business?
A. I worked pretty near six years.
Q. Have you any other trade or occupation except manual labor?
A. No, sir; I have not.
Q. At the time you were injured how much were you earning?
A. Fifty-five dollars a month.
Q. And boarding yourself?
A. And boarding at home.
Q. Since you have been injured what has been your ability to work or to do anything?
A. I have not done nothing.
Q. Why not?
A. Because I couldn't.
Q. What kind of work could you do?
A. I could watch, night or daytimes.
Q. Watch what?
A. Watch around a shop or anything of that kind.
Q. Have you tried to get other employment?
A. No, sir.
Q. What other work could you do if you could get it?
A. Nothing that I know of, unless it would be driving team.
Q. Could you drive a team with your left hand?
A. I think I could.
Q. How much could you earn in that way?
A. If I had a team of my own I think I could earn a living.
Q. But since you have been hurt you haven't been able to go to work?

A. No, sir.

Q. How is your arm? Has that got well yet?

82 A. It has got well, but it pains me once in a while yet. It feels as though the hand was cramping all up.

Q. You haven't got any hand?

A. Well, it feels as though it was there; it wakes me up during the night sometimes—every change of the weather. With that it bothers me quite a good deal.

Q. You are now twenty-six years old?

A. I will be the fourth of next March.

Q. Aside from the injury to your arm, is your health and general strength good?

A. Yes, sir.

Q. What do you say you would have been able to earn per month, if it had not been for this injury, through the balance of your life?

A. Forty dollars a month in a blacksmith's shop.

Q. How much at the railroad business?

A. Fifty-five or sixty dollars; they have got a raise now.

Q. What do you say Mr. Clark said to you when you told him you had never had any experience in railroading?

A. He asked me if I was willing to try—if I was willing to undertake it—and I told him I was.

Q. Willing to undertake it?

A. Yes; and then he handed me a lamp and told me to go up and do as I was told.

Q. You did that, did you?

A. Yes, sir.

Q. Always did that?

A. Yes, sir.

Cross-examination by Mr. SMITH:

83 Q. Where did you live before you went into the employ of the Wabash railway?

A. East Toledo, 860 South Seaman street.

Q. Is your father living?

A. Yes, sir.

Q. Have you any brothers?

A. Yes, sir; I have three.

Q. What is your father's employment?

A. Railroading.

Q. Railroading?

A. Yes, sir.

Q. For what company?

A. The Lake Shore.

Q. How long has he been in their employment and what does he do?

A. He is tending switches.

Q. A switchman?

A. Yes, sir.

Q. How long has he been so employed?

A. Somewhere near about twenty-five years.
Q. Does he live near the Lake Shore yards, on the East Side?
A. He lives within a quarter of a mile of the stock yards.
Q. Have you lived with him all your life?
A. Yes, sir.
Q. What brothers have you?
A. One of my brothers is here.
Q. What is his name?
A. Chris.
Q. What is his business?
A. Railroading.
Q. What doing?
A. Switching.
Q. How long has he been employed as a railroad man?
A. About three years.
Q. For what companies?
A. He has worked for the Wabash. He is working for the Lake Shore now.
Q. How long did he work for the Wabash?
A. I don't know exactly.
Q. He has been working as a switchman about three years?
A. Yes, sir.
84 Q. The duty of a switchman is to couple cars?
A. Yes, sir.
Q. Your brother is working for the Lake Shore Company now?
A. Yes, sir.
Q. You say you were employed by Edward Clark?
A. Yes, sir.
Q. Night yardmaster?
A. Yes.
Q. What had you been doing before you were employed?
A. I worked—the last place I worked was—at the rolling mill.
Q. What doing?
A. Working in the puddling furnace.
Q. What did you have to do?
A. Stir iron.
Q. As a puddler?
A. Yes, sir.
Q. How long did you work there?
A. About two weeks.
Q. And before that?
A. At the blacksmith shop.
Q. Where?
A. At the Vulcan iron works.
Q. How long did you work there?
A. Eleven months.
Q. And before that?
A. At the Smith bridge shop.
Q. At what work?
A. Helping—helping two years—and the other time I worked on the riveting gang.

Q. You had been blacksmithing about six years before you began in the employ of the Wabash?

A. Yes, sir.

Q. Did you tell Mr. Clark you had done blacksmithing work for six years?

A. No, sir; I told him I wanted work on the railroad.

Q. Didn't you tell him you had worked at blacksmithing anywhere?

A. No, sir.

Q. You are sure of that?

A. I am sure of that.

85 Q. Didn't you hand in a written application for service in the employ of this company?

A. Yes, sir.

Q, Before you went into its employ?

A. Yes.

Q. (Shows witness a paper.) I will ask you if that is the application.

A. I think it is.

Q. That is the statement which you made when you went into the employ of the company?

A. The statement I made? I didn't make any statement.

Q. You signed that, didn't you?

A. Yes, sir.

Q. Didn't you bring a recommendation for employment from Mr. Edgar, of the Lake Shore Company?

A. No; I didn't.

Q. Didn't you have Mr. Edgar sign a recommendation for you?

A. Edgar signed that application.

Q. And it was upon this application, was it not, that you were employed by Mr. Clark?

A. I was employed before that application was made out. That application was made out and handed to me the second night I went to work.

Q. The second night that you went to work?

A. Yes, sir.

The COURT:

Q. What is its date?

Mr. SMITH: May 6th, 1887.

Q. It is a fact that you told Mr. Clark about May 6th that you had been engaged in blacksmithing?

A. No, sir; I put it on that application. He signed it on that application.

86 Q. He knew, then, that you had been engaged in blacksmithing?

A. My brother may have told him.

Q. You told him in the application and knew that it was stated in there that you had been in something?

A. Yes, sir.

Q. Mr. Clark asked if you were willing to try?

A. Yes, sir.

Q. And he gave you a lantern and told you to go up there and do as you were instructed?

A. To do as I was told.

Q. Did he tell you under whose instructions you would be placed?

A. No, sir.

Q. Under whom were you working?

A. William Butler.

Q. Under the orders of William Butler?

A. Yes, sir.

Q. He was pony conductor?

A. Yes, sir.

Q. And you were placed under his orders?

A. Yes, sir.

Q. And whatever he told you to do it was your duty to do it?

A. Yes, sir.

Q. So that in coupling cars and breaking trains and making up trains you were under the immediate orders of William Butler?

A. Yes, sir.

Q. That is right, is it?

A. Yes, sir.

Q. And he gave you your instructions as to what you were to do every night?

A. He didn't give me any instructions.

Q. Didn't he tell you what cars were to be coupled and onto what other cars?

A. No, sir.

Q. Never?

A. No, sir; he didn't. He would cut off a car and you was supposed to get onto it and ride it down.

87 Q. And couple it onto another car?

A. Yes.

Q. How did you know that car was to be coupled onto another car?

A. I knew the coupling was to be made; we always made it.

Q. How did you know which ones to take and which ones to make up; how did you know in this case that the New Jersey Central car was to be coupled to the Merchants' Despatch?

A. The cars were marked for to go down below.

Q. Who marked them?

A. Jack Shaw and the car inspector marked them.

Q. You judge from the marks on the cars where they were to go?

A. Yes, sir.

Q. It was from the markings on the cars that you knew where they were to go?

A. Yes, sir.

Q. In doing that work you were under the immediate order of Mr. Butler?

A. Yes, sir.

The COURT:

Q. Who told you to put these cars together?
A. Nobody.
Q. Were there any marks on these cars?
A. Yes, sir.
Q. Nobody told you to put them together on that occasion; nobody directed you to go and couple those cars?
A. No, sir.

Mr. SMITH:

Q. You simply judged from the marks on the cars?
A. I knew that the coupling was to be made on account of Butler walking by it. We was going to take the cars down below and Butler walked by it, and I knew I was supposed to make the coupling. Butler was going down towards the other end of the string.
88 Q. You say that the draw-head of one of these cars was four inches higher than the draw-head of the other side?
A. Yes.
Q. Which one was the higher one?
A. The Central railroad of New Jersey.
Q. And that was the one which was moving next to the engine?
A. Yes.
Q. Was backing up to the other car?
A. Yes, sir.
Q. Could you see it as it came so as to know that it was higher?
A. No, sir.
Q. You saw the car coming down?
A. Yes.
Q. Did you know this—that the draw-bar was higher?
A. No, sir.
Q. How do you know then?
A. When I stepped in to make the coupling I could see that it was higher.
Q. Was it light so that you could see it?
A. Yes, sir.
Q. Perfectly light?
A. Yes, sir.
Q. When you stepped in to make the coupling you could then see that the draw-head of the New Jersey Central was higher?
A. Yes; come to see close enough to tell the difference between them.
Q. Did you see that the deadwood was substantially like this big deadwood on the model?
A. Yes.
Q. Could you see that?
A. Yes, sir.
Q. Plainly?
A. Yes, sir.

Q. And you could see that it came down below the draw-head like that?

A. Yes, sir.

Q. And up above it like that?

A. Yes, sir.

Q. How far below the draw-head did it come?

89 A. About six inches, I should judge.

Q. How far above the draw-head did it extend?

A. About the same.

Q. And the Merchants' Despatch car had bumpers substantially like this?

A. Yes, sir.

Q. You said that the lower part of the bumper came down about on a level with the draw-head?

A. Yes; I think it did.

Q. Did you see the bumper of that Merchants' Despatch car?

A. Yes, sir.

Q. The link was in the stationary car?

A. Yes, sir.

Q. In the Merchants' Despatch car?

A. Yes.

The COURT:

Q. That had to be lifted up to hit the car which was coming up?

A. Yes, sir.

Mr. SMITH:

Q. When you couple cars you generally guide the link so that it will enter the draw-head on the other side?

—. Yes, sir; on some railroads they compel them to use a stick.

Q. But you have always used the hand to guide the link, have you?

A. Yes, sir.

Q. Do you always have to use the hand to guide the link along to enter the draw-head on the other side?

A. I always did.

Q. You always have to lift the link simply, don't you?

A. Sometimes you have to lift it up and sometimes to lower it.

Q. You have to guide the link with the hand?

A. Sometimes you do and sometimes you don't.

90 Q. Did you frequently have to guide it with your hand?

A. You always have to guide it with your hand—the link drops down.

Q. You have to raise it up from underneath?

A. Yes.

Q. With the hand?

A. Yes, sir.

Q. So that it will enter?

A. Yes.

Q. And if this draw-head on the opposite side is a little higher you have to raise it up?

A. Yes, sir.
Q. And if it is a little lower you have to drop it down like that?
A. Yes.
Q. You don't usually find it necessary to put the pin in with your hand, do you?
A. No, sir; you can set the pin up in that shape against the car before the car gets to you.
Q. When they bump together it joggles the pin down?
A. Yes.

The COURT:

Q. You don't have to reach over to put in the pin?
A. No, sir; you only just set it.

Mr. SMITH:

Q. You say that when these cars came together you got your arm pinched in between these two deadwoods?
A. Yes.

The COURT:

Q. I thought he said first that he reached over the deadwoods?
A. I had my arm in under the deadwoods.
Q. To guide the link?
A. Yes, sir; and the link was heavy.
Q. How did your arm get between the bumpers, then?
A. I don't know.

91 Mr. SMITH:

Q. You don't know how it got there?
A. It was by raising up the link.

The COURT:

Q. You raised the link so much that it brought your arm up between the bumpers?
A. Yes, sir.

Mr. SMITH:

Q. You worked in the employ of the company all of May and June and up to the 11th of July, did you not?
A. I worked some of the time extra in May—the first part of May I worked extra.
Q. What do you mean by "extra"?
A. An extra man—that they didn't have no place for me.
Q. How many days were you working?
A. I worked two months and thirteen days from the day I started until I got hurt.
Q. From the 28th of April until you got hurt?
A. From the 29th of April.
Q. In that time how many cars with deadwoods like these of the Merchants' Dispatch did you couple?
A. On the average, one a week.

Q. Didn't you see more than that?
A. I have seen them, but I didn't have to handle them.
Q. You saw them?
A. Yes, sir.
Q. How often would you see them coming through the yard?
A. They would be standing on the tracks there.
Q. Every day?
92 A. Every day. I couldn't see all over the yard in the night.
Q. Didn't some of those cars come through the yard every day?
A. I don't know. I was not there in the daytime.
Q. I mean during the hours you were employed.
A. I seen the cars sometimes in the yard, in the daylight, standing still, we wouldn't have anything to do with.
Q. It was light during the last two or three hours that you were working?
A. Yes.
Q. And you saw these cars there frequently, did you not?
A. I seen them; yes.
Q. Didn't you ever see a Central railroad of New Jersey car?
A. Not before this one that I remember of.
Q. Did you ever see a Philadelphia and Reading car in the yard?
A. Not as I know of.
Q. A P. and R. car?
A. I have seen them there. There was a great many of them standing on the coal dock. They were standing there all the time in the daytime.
Q. How often did those P. and R. cars come through the yard?
A. I don't know.
Q. About how often while you were there? Give us your best judgment.
A. I don't believe we handled five to six P. and R. cars while I was there.
Q. Did you have occasion to couple them?
A. No, sir.
Q. Did you ever see any Delaware, Lackawana and Western
93 cars there in the yard?
A. I have seen those without deadwoods on them.
Q. Did you ever see any of them with the deadwoods on?
A. I have seen them on the D. and M. and on the Lake Shore.
Q. Haven't you seen deadwoods on that company's cars?
A. Yes.
Q. How often while you were there did you ever see cars of that construction?
A. I don't believe I have seen any there in the yard with deadwoods on—Delaware cars.
Q. How about the New York, Lake Erie and Western cars? Haven't the- double deadwoods on?
A. Not that I know of.
Q. Didn't you ever couple any New York, Lake Erie and Western cars?

A. I don't know whether I ever did or not.

Q. About what proportion of cars that came through the yard of the Wabash Company at the time you were there were of other roads? That you had to couple, I mean.

A. There was Lake Shore and Merchants' Despatch.

Q. You don't understand my question. In the course of your employment you had to couple cars of the Wabash Company and also had to couple cars of other companys' lines?

A. Yes.

Q. About what proportion of the cars that you had to couple came of other company's lines—one-half or one-tenth or what proportion?

94 A. There was not but a very few from the other lines of cars came there?

Q. How many trains were made up in the yards every night?

A. There was two that we made up.

Q. And how many cars in each train?

A. We sometimes had thirty-five cars and sometimes not so many. They would average about thirty cars.

Q. About how many times were you called upon to make couplings during the night on both trains?

A. I and Frank Heminger had to do all the local—just us two.

Q. How many times did you have to couple cars during all the nights that you were there?

A. I don't know. I never kept track of that—how many.

Q. How many times did you couple to make up one train?

A. I would have probably fifteen or twenty couplings to make on one train.

Q. And on the two trains you would have twice as many?

A. The other one was a local.

Q. Did you have so many couplings on that?

A. No, sir; sometimes that didn't have so many cars.

Q. But you would have twenty or twenty-five couplings to make every night in making up those trains?

A. Yes, sir.

Q. About how many cars, upon the average, in each of those trains came from other lines?

A. Oh, about forty cars in those trains.

95 Q. How many of those thirty-five or forty cars in one of those trains would be Wabash cars and how many cars that came from other lines?

A. Most all would be Wabash cars.

Q. How many came from other lines in a train of forty cars?

A. Four or five.

Q. There was one-seventh or one-eighth of the cars in those trains came from other companies?

A. Yes.

Q. Were foreign cars?

A. Yes, sir.

Q. Is that right?

A. Yes.

Q. You would not say it would be more than that now?

A. No.

Q. It was your duty in the ordinary course of your business to couple all of these cars, was it not?

A. Yes; to couple my share of them.

Q. You say that in these Jersey Central cars with these long deadwoods the links were about six inches on the draw-bar?

A. I think so.

Q. Is that derived from your personal observation?

A. Yes.

Q. Personal observation of this car?

A. I should judge it would go in about six inches into the draw-bar.

Q. Do you judge it from your observation made before you were hurt or since you were hurt?

A. I always thought that.

Q. Before you were hurt?

A. Yes, sir.

Q. About six inches on the other side?

A. No, sir.

Q. In the other car, I mean?

A. It goes to the same distance.

Q. How long is that link?

96 A. About ten inches; it may be a little more and it may not be quite so much; it may be more or it may not. I don't know how far the link will go into the draw-bar; I never measured it.

Q. You said that your hand wasn't hurt at all?

A. No, sir.

Q. It was just that your arm was caught between the deadwoods, right here?

A. Yes.

Q. But that your hand wasn't scratched?

A. No, sir.

Q. It was your business to do the coupling on the east-bound trains as well as on the west-bound?

A. Yes.

Q. Your testimony had reference to the east-bound business that you were giving just now. When you said that you had to make up two trains, you meant east-bound trains?

A. I meant going out.

Q. What do you mean—going west?

A. Yes.

Q. But it was your business to couple and uncouple cars going west that came in from the east?

A. Half of the time we didn't make the coupling.

Q. But you did make it sometimes?

A. Yes, sir.

Q. About half the time you would couple and uncouple cars from the east?

A. I never had to uncouple them.

Q. Your business was to help to make up trains?
A. Yes.
Q. Who did it the other half of the time?
A. Frank Herringer; there was three of us at work with the pony.

Q. About how many couplings on the average during the
97 night would you have to make on the east-bound cars?
A. Trains coming in?
Q. Yes.
A. When I worked there there was a good deal of grain coming from the west, and we didn't have to make anywheres near as many couplings.
Q. About how many during the night, each night on an average? Give us an idea.
A. Sometimes we had about ten couplings to make.
Q. In addition to those you had to make on the west-bound?
A. Yes.

Re-examination:

Q. I understand you only had to couple cars where it was necessary to take out or to put in cars?
A. Yes; where we made up trains.
Q. These trains that you speak of going west from Toledo, were they made up here?
A. Here; yes.
Q. All of them?
A. Yes.
Q. You had two hands to do that coupling?
A. Yes, sir.
Q. Wasn't there any through freight going west? Do you mean to say that you had to couple every car that went in the trains?
A. Yes, sir; we did.
Q. Those are made up two trains a day?
A. Two trains a night.
Q. I don't understand what you say about this link going in six inches into this kind of a draw-bar. You said you always thought it went in that way. You are guessing at it, or would you know how far this link went in?
A. I am guessing at it.

The COURT:

98 Q. The links necessarily have play to let the pin drop down?
A. Yes, sir.

Mr. FORD:

Q. These New York and Lake Erie—what do you say as to whether they had bumpers on or deadwoods?
A. Not that I know of.
Q. Do you remember of coupling any of those?
A. No, sir.

Q. The Lackawana cars, where did they come from?
A. They came from the west.
Q. That is an eastern road, isn't it?
A. I don't know which way the road runs.
Q. What do you know about these Delaware and Lackawana cars?
A. Nothing at all.
Q. What have you seen on them?
A. I have seen that they have those big deadwoods on, the same as the Central railroad of New Jersey.
Q. Do you remember whether you ever coupled one of those cars?
A. No, sir.
Q. What cars stood at the coal docks?
A. P. and R.
Q. What road is that?
A. I don't know.
Q. Where is that coal dock?
A. Right in the yard.
Q. In the part of the yard that you were at work on?
A. Down this way from where I worked.
Q. Did you have anything to do with the coupling of cars on that part of the yard?
A. Sometimes we had cars to put in there.
Q. To couple, I mean.
A. Yes, sir; we didn't make no couplings but shoved them in there.
Q. You made no couplings, but simply shoved them in there?
A. Yes, sir.
99 Q. I understood you to say that you knew what cars were to be coupled by the marks on them?
A. Yes, sir.
Q. Who had the direction of the moving of these cars up and setting them around?
A. Billy Butler.
Q. What was he?
A. Pony conductor.
Q. He would take hold of a car and throw it up and send it back?
A. Yes.
Q. How did you know where to couple it?
A. Let it run to another string of cars.
Q. Let it run down to where it was sent and then you would couple it?
A. Yes.
Q. Was it a custom or rule there to give any instructions as to where a particular car was to go, or did you learn it from seeing it go?
A. I learned it from seeing it go.
Q. You say this written paper was given to you how long after you went to work?
A. The second night after I went to work, I think.
Q. When did you sign it?
A. He asked me if I had told Ed. Clark that I had worked in the

blacksmith shop. I said I didn't. I said I knew it was in that paper. I carried the application in my pocket for a couple of days.

The COURT:

Q. You hadn't been paid until after that was put on?
A. No, sir.

Mr. SMITH:

Q. Do you know what these deadwoods are, what they are for?
A. Yes; to prevent breaking the draw-bars.
Q. Is that all they are put there for?
A. Yes; to take a man's arms.
100 Q. What?
A. To cripple a man; that is all the deadwoods are good for.

Mr. FORD:

Q. Man-killers?
A. Yes.

Testimony of Wm. Butler.

Plaintiff, further to maintain the issues on his part, called as a witness WILLIAM BUTLER, who, first being duly sworn, testified as follows:

Direct examination by Mr. FORD:

Q. Where do you live?
A. On Locust street, 2311.
Q. What is your occupation?
A. Switchman.
Q. Where were you employed in the month of July, 1887?
A. For the Wabash Company.
Q. Do you know Adam Kohn?
A. Yes, sir.
Q. Were you at work for the company when he came to work?
A. Yes, sir.
Q. How long had you been at work for the company before that?
A. About a year and a half, I guess.
Q. You had been at work for the Wabash?
A. Yes.
Q. At that time, how long had you been in the railroad business yourself?
A. About eight or nine years all together, now.
Q. You had then been about eight years?
A. Yes, sir.
Q. What part of that time had you worked as a switchman about railroads coupling cars?
A. About half of the time I had charge of an engine and the other half as helper.

The COURT:

101 Q. Switching?
A. Yes, sir.
Q. In the Wabash yards?
A. No; I have worked for the Wabash about three years, I guess.

Mr. FORD:

Q. Were you at work for the company all the time that Adam was there—between the 29th of April and the day he got hurt?
A. Yes; I think I was.
Q. Was he one of your gang?
A. Yes, sir.
Q. How many are called a gang in switching?
A. There are three of us on the ground—three switchmen.

The COURT:

Q. Are you speaking of the night of the accident?
A. Generally.

Mr. FORD:

Q. Three on the ground, and two where?
A. And the engineer and the fireman.
Q. What were the duties of those men; the switchmen—the men on the ground—the three of them?
A. To couple cars, to make up trains, and to break up trains.
Q. And couple cars?
A. Yes, sir.
Q. Did they have anything to do with the moving of cars about or to tell where they go—who had charge of that?
A. The yardmaster gave me instructions and I gave my men instructions.
Q. What do you mean by your men?
A. The two helpers that worked with me.

The COURT:

102 Q. Then you were the conductor of the gang and there were two men and yourself?
A. Yes, sir.
Q. You controlled all three of you?
A. Yes, sir.

Mr. FORD:

Q. What did you do to control them?
A. I knew what cars were to go on these trains and they were scattered about the yard. The cars were marked.
Q. Who marked them?
A. M. Shay; he is the man that marked the cars.
Q. Who is Shay?
A. The bill buster.
Q. What is his office?

A. Yard clerk. The cars coming from the Lake Shore are already marked where they are going.

Q. What part of the time that Adam Kohn was there did you work with him from the time he commenced in April until he was hurt?

A. I think he helped me all the time he was there.

Q. Do you remember of his being hurt?

A. Yes, sir.

Q. You were on duty at that time, were you?

A. Yes, sir.

Q. What were the two cars that he was hurt between?

A. A M. D. car and——

Q. What is that—doctor of medicine?

A. Merchants' Dispatch.

Q. What was the other car?

A. Central New Jersey.

Q. Where were these cars standing at that time?

A. When the trains came in from the east they pulled into track No. 1.

Q. Up in the yard?

A. Yes, sir.

Q. What did you have to do with that?

A. We switched out the stuff that went to the Lake Shore
103 and down into the lower yard—switched it out onto the main track.

Q. What were you doing with the cars that he was hurt between?

A. Switching them out of that train. They went down into the lower yard, I believe—I disremember.

Q. Where were they standing when he was hurt?

A. On the main track.

Q. How many were there in that string of cars?

A. On the main track?

Q. Yes.

A. I should judge nine or ten in the string.

Q. Which car was the stationary car—at which end of the string?

A. The M. D.

Q. What was being done with the New Jersey Central?

A. In switching I kicked that car, too, out on the main track.

Q. You had kicked it out before?

A. Yes; and I had another car kicked out in the yard, and Kohn rode that in and I coupled the engine onto the Central of New Jersey and was going to back down to couple onto the rest of the string. I got there a little before Adam did and I walked past the coupling.

Q. You walked down to where the M. D. was?

A. Yes; and there Adam came across—about a hundred feet, I guess, from where the other car went down.

Q. How far had you got by the M. D. when they came together?

A. About a car length.

Q. Further down the string?

A. Yes, sir.

Q. Did you see him get hurt?

104 A. I seen him when he came out from between the cars; his arm was bleeding; I saw him also before he was hurt.

The COURT:

Q. You didn't see him hurt; you saw him as he went in to couple?
A. Yes, sir.
Q. You didn't see how he manipulated it at all?
A. No, sir.

Mr. FORD:

Q. What kind of couplings had the Merchants' Despatch?

The COURT:

Q. Did you notice how they were?
A. This was a stationary link in the M. D. car; a stationary link, one that stays there with the car all the time; you can't take it out.
Q. Was the link in the stationary car?
A. Yes, sir; and he had to raise the link up.
Q. Mr. Kohn said the link was in the approaching car?
Mr. FORD: No; in the stationary car.

The COURT:

Q. How do you say it was?
A. It was in the stationary car.

Mr. FORD:

Q. What kind of a link was that; was it stationary or something that you could take out?
A. No; it was stationary.
Q. In the draw-bar of the M. D. car?
A. Yes.

The COURT:

105 Q. Those links are taken out between the cars; there are no links fastened in the cars?
A. Yes, sir; in this one.
Q. Fastened with a pin?
A. No; there was no pin to this; I don't know how it is fastened, but it stays there.
Q. Wouldn't come out?
A. No, sir.

Mr. FORD:

Q. How long was that link?
A. I guess the whole business must have been twelve or fourteen inches long.
Q. The link?
A. The whole link inside of the draw-bar and out.
Q. When that was in the end of the draw-bar, did it tip up and down?

A. Yes.
Q. What kind of deadwoods did that M. D. car have?
A. It had an iron——
Q. Iron deadwood?
A. Yes.
Q. About how large?
A. About six inches square.
Q. What kind of deadwoods did the New Jersey Central have?
A. That long one.

The COURT:

Q. Did you notice at that time?
A. Yes, sir; I noticed the car.

Mr. FORD:

Q. How long were they?
A. I should judge the deadwood about twelve or fourteen inches long.
Q. Something of this kind (referring to model)?
A. Yes.

The COURT:

106 Q. Made about like that?
A. Yes, sir; you couldn't get at it any nearer than it is there.

Mr. FORD:

Q. Are you acquainted with those long deadwoods; have you had any experience with them?
A. Yes, sir; quite a bit.
Q. Where have you had experience with them?
A. In the different yards where I have worked in.
Q. Different yards?
A. Yes, sir.
Q. During, say, that two and a half months that Adam Kohn worked there, say as to whether you had any of those New Jersey Central cars in your service during that time.
A. I remember of seeing one; I never remember of seeing very many of them.
Q. Do you mean this one that hurt him?
A. Yes; since I worked there I have never seen very many of them cars.
Q. Particularly during the time that Adam worked there did you see any of those cars with the big bumpers on while he was working with you?
A. I saw these D., L. and W. cars; they have big bumpers something like that.

The COURT:

Q. You saw others that had those bumpers on?
A. Yes; that one kind.

Mr. FORD:

Q. Did you see any of these New Jersey Central cars? I mean while he was working there?
A. I don't know as I did.

107 The COURT:

Q. The deadwood on the New Jersey Central is like those?
A. Yes, sir; like the D. and L.; they are of different sizes.
Q. They are all intended to be as thick, so that the bumpers would just strike together?
A. Yes, sir.
Q. Always thick enough to correspond with the draw-heads?
A. Yes, sir.

Mr. FORD:

Q. I mean up and down?

The COURT:

Q. I suppose the draw-heads are not all of the same size?
A. No, sir.
Q. There is a difference in the length of the draw-heads?
A. Yes, sir.
Q. They put the bumpers on high enough so that they will all hit together?
A. Yes; about at the same time as near as I can get at it.

Mr. FORD:

Q. Is that so of the small six inches in diameter?
A. Yes.
Q. I want to get at how generally these big bumpers were in use on that road while Adam was there; you say you don't remember of seeing any of the New Jersey Central?
A. I don't remember of seeing any there.
Q. How many of the Delaware & Lackawana did you see while Adam Kohn was working with you; what proportion of the cars with the big deadwoods did you see?
A. Of course if you get two of them together——

108 The COURT:

Q. Get the proportion of these big bumpers that you would couple together in a night.
A. I didn't see but a very few of them.
Q. Forty per cent. or ten out of a hundred or how?
A. About that, I guess.
Q. About ten out of a hundred?
A. Yes, sir.

Mr. FORD:

Q. What kind of bumpers do you mean?

A. I didn't see but a very few of this kind. I don't know how many, but I know they handled some of the others.

Q. Do you mean eight or ten with the big, long bumpers on or the small bumpers?

A. I don't know just how many we handled. It might have been five or six.

Q. With the long bumpers?

A. Yes.

Q. What roads?

A. The L. & W.'s or like that.

Q. Any others?

A. The Lehigh Valley has them like them.

Q. Did you have any of the Lehigh Valley?

A. I didn't see any.

Q. Did you ever see any of the Delaware & Lackawana while Adam was there employed by you coupling these cars?

A. I could not say.

Q. How many of these did you know of—those cars in your service with the long fourteen-inch deadwoods on—while Adam Kohn was there helping you?

A. I didn't see many. I don't know whether there was any there when he was there or not.

109 Q. What kind of a car is the Wabash? Have they any deadwoods?

A. No, sir; I never saw any.

Q. Compared with the Wabash car that had no deadwoods at all, what would you say about the difficulty of making a coupling on a car with these things on?

A. I will take the ones without the deadwoods. They are safer.

Q. Why?

A. Because a man is liable to catch his arm in there.

Q. What is the difficulty with these?

A. They come closer.

The COURT:

Q. What do you say?

A. I will take mine without the deadwoods. The deadwoods are more dangerous, I think.

Mr. FORD:

Q. What makes them more dangerous?

A. If a man would stick his arm in there and them two deadwoods come together it will catch him.

The COURT:

Q. If a man put his arm between the bumpers it will be mashed all to pieces?

A. Yes; if you leave it there. Of course, you have got to put your hand in there in order to reach the link.

Mr. FORD:

Q. What is the difficulty in making the coupling with this thing on there with safety to the man who is working?

A. If he puts his arm in there and leaves it there it will
110 catch him, of course. A man can take a stick and couple.

The COURT:

Q. Tell the jury how is the proper way to couple those bumper cars.

A. If I was going to couple it I would take and set the link.

Q. What is the proper way?

A. That is all the way I can tell you. I most generally set the link and start it so it will go into the other draw-bar.

Q. Then what?

A. Then get away from it.

Q. Is that the usual and proper way to do it?

A. That is the way I would do it.

Q. Is that the way other brakemen do it?

A. I couldn't tell you.

Mr. FORD:

Q. How long have you been a switchman?

A. Eight or nine years.

Q. Do you consider that the only safe way to do it?

A. I think so.

Q. How do you couple Wabash cars without the draw-bars coming together? Is there any danger about those?

A. Not so much; of course, a man in coupling cars can get hold of the link on these Wabash cars and enter it, and that is all there is of it.

Q. The danger with these is in entering the link, of these timbers catching your arm?

A. Yes.

Q. And they set the link in the aproaching car and get back out of the way?

A. Yes, sir.

The COURT:

Q. What do you mean by setting the link?

111 A. The link hangs a little down. You can put a little stick of wood under it and hold it up.

Q. You make a piece of wood answer the purpose of your hand in holding it up?

A. Yes, sir.

Q. How did you learn how to do that?

A. I got onto it.

Q. How, from experience?

A. Yes, sir.

Q. If you had never seen or coupled one of these cars what would you know as to how to do it?

A. I don't know how I would tackel it.

Q. What would you say as to a man's being able to couple one of those cars who had never seen one or coupled one, with safety to himself, if he didn't know anything about it?

A. It wouldn't be very safe, I don't think, if he didn't know how to manage the thing.

Q. You said something about a stick. You mean that the stick would be put in here and raise up the link?

A. Yes, sir.

Q. Is there any way of making that coupling with a stick from below and standing back out of danger?

A. You could put a stick between the draw-bars and let it crush the stick.

Q. Let the stick come in the place of your arm?

A. Yes, sir.

Q. How could a man, an experienced man, go to work to couple a thing of that kind where these big bumpers are up and down?

A. Just the way I say.

Q. That is, putting the pin in and getting away?

A. Yes.

112 Q. Could you reach down under here to do that or get over here to do it?

A. No.

Q. So you would have to go through here?

A. Yes.

Q. How much time is there in the ordinary practice between the time that the link gets far enough to enter the end of the draw-bar before these timbers come together with a thing of that kind on it?

A. Three or four inches; it gets pretty close in.

Q. That is, the two or three or four inches apart after the link enters the end of the draw-bar?

A. Yes, sir.

Q. What would you say, from your experience as a railroad man, as to that being a dangerous apparatus to effect a coupling with?

Mr. SMITH: I object to that, but let it go.

The COURT: Of course, it is dangerous for a man to put himself in the way of it, and it is dangerous for a man to stand on the track if the train is coming.

Q. The use of those bumpers makes it necessary for a man carefully to make the coupling. He has got to look out and see what he is doing, has he not?

A. Yes, sir.

Q. If he puts his hand or arm between the bumpers he gets it mashed?

A. Yes, sir.

Q. But they don't come close enough together to hit him?

A. He can enter the link and get away, but you can get hurt on those cars just as well as on any other cars.

Q. You could stand inside of the draw-bars to guide the link without its hurting you?
A. Yes, sir.

Mr. FORD:

113 Q. But you could not on one of these?
A. No, sir.

Cross-examination by Mr. SMITH:

Q. Your testimony has been with reference to these long draw-bars and the coming together of two cars of this kind?
A. Yes.
Q. Suppose one of the cars to be coupled was one of this kind, of the Merchants' Despatch, with the bumper of cast-iron?
A. Yes.
Q. Above the level of the draw-head?
A. Yes.
Q. In that case a man could enter his hands and lift up the link without getting pinched, unless he gets it above the draw-head?
A. Yes.
Q. In this case if Mr. Kohn got his arm pinched it must have been above the level of the draw-head?
A. Of course I can't say how he done it.
Q. You would say that he must have got his arm above the level of the draw-head?
A. It couldn't have caught him if he had had his arm down below there, but he claims that one draw-bar was higher than the other; he might have been raising that link up.
Q. But he must have got his arm above the level of the M. D. draw-head.
A. I suppose so.

Mr. FORD:

Q. But suppose this is four inches higher?

The COURT: Then it will hit him.
WITNESS: Yes, sir.

Mr. SMITH:

Q. If the man keeps his arm below the level of this
114 he is all right?
A. Yes, sir.
Q. It would be possible to make a coupling between these two cars by keeping your hand below the level of this cast-iron bumper and then a man would be perfectly safe, wouldn't he?
A. I think so.
Q. And he couldn't be hurt unless he got it above the level of the draw-bar?
A. No, sir.
Q. So that a man could make the coupling between those two cars with safety if he exercised caution?

A. I think he could.
Q. Do you know what these bumpers or deadwoods are for?
A. I suppose to protect the draw-bar.
Q. And to break the shock to the car?
A. Yes, sir.
Q. Suppose there were no deadwoods and a man came between the cars and the coupling or the draw-bar gives away or breaks, wouldn't it be more dangerous for a man to be between cars of that kind without the deadwoods than with them?
A. If they happen to break.
Q. When you are making couplings don't you get between the deadwoods?
A. Yes; but if a car gets too close, let him keep out.
Q. You have seen them slip by each other?
A. Yes.
Q. Those draw-bars?
A. Yes, sir.
Q. They would be more apt to crush him without than with?
A. I have been in and had them slip past me.
Q. Without any deadwoods?
A. Yes, sir.
Q. You came pretty near being killed, didn't you?
115 A. I had a pretty close call, but it didn't hurt me any.
Q. If these big deadwoods had been there you would have been safe enough, wouldn't you?
A. Yes; I guess so.
Q. Your idea is that during the time that you were there about one-tenth of the cars which came through were provided with deadwoods like that here?
A. The New York and Lake Erie road has deadwoods looking something near.
Q. The Lehigh Valley have got big deadwoods?
A. Yes.
Q. Your idea is that about ten out of a hundred had bumpers on of one or the other kind?
A. Yes, sir.
Q. And of these ten about half of them would have the long bumpers?
A. Yes; but I wouldn't say at that time while he was at work, though.
Q. That is about the average?
A. Yes; that is about the way it runs the year round.
Q. It was not different at that time from what it usually was?
A. About the same.
Q. Did you look at these draw-bars?
A. I didn't examine them much.
Q. Were not they very nearly of the same height?
A. I didn't examine them much. I seen that the deadwoods were the same as those.
Q. You understood that the deadwoods hurt him?
A. Yes, sir.

Q. Did he say anything after he was hurt?
A. He said, "Oh, I am hurt."
Q. Did you ask him how he was hurt?
116 A. I didn't ask him no questions; we tied the arm up just as quick as we could, so he wouldn't bleed.
Q. You understood that he was hurt by getting his arm between the bumpers?
A. Yes, sir.
Q. You didn't look at the bumpers?
A. I didn't examine them.

Re-examination:

Q. I want to find out how these six inches here prevents a man from getting killed if the deadwood slips. They stick out there about how far?
A. About six inches, I guess.
Q. Do you say that if they were not there and those cars came together that the six inches would save a man's life?
A. It is six inches on each car—about twelve inches.
Q. That would save a man's life?
A. If he wasn't too large.
Q. Where do you work now?
A. For the Wheeling and Lake Erie.
Q. (Shows witness model.) How would it be, take the condition of the draw-bars of these cars?
A. If this one was lower?
Q. Yes; about coupling under there.
A. They would hit just the same, but he would have to raise this link in order to get it in there.

Testimony of Jas. Caldwell.

Plaintiff, further to maintain the issues on his part, called as a witness JAMES CALDWELL, who, first being duly sworn, testified as follows:

Direct examination by Mr. FORD:

Q. What is your business?
A. Railroading.
Q. How long have you been railroading?
117 A. I have been railroading since I commenced in '68 shovelling on the track.
Q. Have you been switching?
A. Yes, sir; I have been a switchman and a brakeman.
Q. How long have you been in the railroad business?
A. Since '68.
Q. Twenty years?
A. Yes, sir.
Q. And during that part of the time how much have you acted as switchman?
A. I commenced switching in 1872.

Q. Have you been switching ever since?
A. Yes, sir; I have.
Q. What are you doing now?
A. I am switching at the present day.
Q. And what railroad are you working for?
A. The Lake Shore.
Q. Where were you employed in 1887?
A. I was employed in the Wabash.
Q. Were you employed there at the same time that Kohn was?
A. Yes, sir; I was.
Q. How long before Kohn went to work had you been under the employ of the Wabash?
A. I commenced there in the fall of the year. I disremember the date. It was December 3rd.
Q. That would be '86, the fall before?
A. I can't say what fall it was.
Q. How many years before?
A. It wasn't but a year or so before.
Q. Before Kohn went to work?
A. Yes, sir.
Q. Did you work there all the time that Kohn did?
A. Yes, sir; I did.
118 Q. Whom did you work with?
A. Well, I worked with Mr. Heminger while I first worked there.
Q. While Kohn was there did you work in the same gang that Kohn did?
A. No, sir; I worked with Mr. White; he was yardmaster in the lower yards nights.
Q. How far away is that yard from where Kohn worked?
A. I should judge about half a mile.
Q. Did you work at any time where Kohn was?
A. Mr. Kohn helped me two nights; two nights I will swear to.

The COURT:

Q. Down at the lower yard?
A. Yes, Judge.

Mr. FORD:

Q. You were on the middle ground, near this place, all the time that Kohn was working in the upper yard?
A. Yes, sir.
Q. Did the same cars come into the different yards?
A. I couldn't tell you that; of course they might handle cars that I didn't handle, and I might handle cars they didn't handle, but all the cars they didn't know what to do with was throwed down to me, and I had to handle them; Mr. Grasser, the yardmaster, can tell you that.
Q. Are you acquainted with the cars with the big deadwoods on?
A. I had ought to be; I have handled them enough.
Q. Where have you handled them?

A. On different roads.

Q. What roads?

119 A. I have handled them on the C., H. & D., the Lake Shore, and the Wabash. I have worked in the three different yards.

Q. Do any of the regular cars of those roads have these big bumpers on?

A. No, sir; they do not.

The COURT:

Q. That is, the Wabash?

A. No; the Wabash, the Lake Shore, nor the D. & M.; that is what you want to get at, I suppose.

Mr. FORD:

Q. I want to know what you know about this: The spring and summer of 1887—the summer that Kohn got hurt there, and while you were at work for the Wabash and switching those cars back and forth—were there many of those cars came in there?

A. They didn't, to my knowledge.

Q. They didn't?

A. No, sir.

Q. Are you acquainted with the New Jersey Central car? Do you know it when you see it?

A. I am.

The COURT: He says there didn't any come in.

WITNESS: I understand you—"New Jerseys."

The COURT:

Q. He don't mean to say that there were any cars with the bumpers came in?

A. There was lots of cars came in there with bumpers on, but we are talking about New Jerseys.

Mr. FORD:

Q. Yes; that is what we are talking about. What would you say as to whether any of these cars came in there during that time?

120 A. There was, I might say, three (3).

Q. Three New Jersey cars?

A. Yes.

Q. Besides this one?

A. That will count this one, of course. I don't know what happened in the upper yard. I am talking about my yard.

Q. What kind of bumpers did the other railroads have on, smaller or larger?

A. There was different kinds. There was the Pennsylvania cars had these what you might call eight by tens.

Q. That is a small bumper?

A. That is a small bumper and the—what the hell is it now—the Empire. That has just about the same.

Q. The same size?
A. They were about the same size.
Q. What roads, if any, had these big, long ones on?
A. The Lehigh Valley.
Q. What other roads?
A. None that I remember.
Q. How often did you have the Lehigh Valley's?
A. Very seldom.
Q. How long was the bumper of the New Jersey Central?
A. Just about the same as the Lehigh Valley with the exception that they come together closer up at the draw-bars.
Q. How long are they up and down?
A. About fourteen inches up and down.
Q. From your experience on other roads where you have had these cars what do you say about the difficulty or danger of coupling these big cars with these big deadwoods on them?
121 A. I say they are more dangerous than the common deadwoods.
Q. Why?
A. Because they are longer up and down, and you have no chance to get your arm under them nor over them. The other draw-bars are just the same as—here is the draw-bar right over here and here is the deadwood, and you can get your arm under them or else you can get it over them.
Q. And not have any danger?
A. And not have any danger whatever.
Q. But with these things you can't do that?
A. No, sir; you have got to either get your arm under them and set down on your knees and make the coupling or else you have got to reach your arm away over here; mor'n your arm will stand.
Q. If a man had never seen one of those cars and had to couple it what would you say as to its being safe or dangerous to do?
A. He had better stay out. He would have to run his own risk. He would have to put his hand in there and make the coupling or else not make it.
Q. Is there any other way to make that coupling?
A. No, sir.
Q. He may take a stick or pole?
A. Yes; he may take a stick or pole just as the company would require, but, so far as I can learn, the company never instructed Mr. Kohn to use a stick or anything else.
Q. Did they ever instruct you?
A. No, sir; they didn't. They never instructed me. I may
122 say that. It don't make any difference whether it is these or the others. They have got to instruct any one that goes to work for them.

Cross-examination by Mr. SMITH:

Q. You say you have handled these cars with the long deadwoods a good deal?
A. Yes, sir.

Q. In the Lake Shore yard?
A. Yes; in the Lake Shore.
Q. And the Cincinnati, Hamilton & Dayton?
A. Yes.
Q. And on the Wabash?
A. Well, I have worked in the three yards.
Q. And you have had a good deal of experience with that kind of deadwood?
A. I have.
Q. Up to the present time?
A. Up to the present time; yes.
Q. And about what proportion of cars that came through the Wabash yards in 1887 had these deadwoods on?
A. A very few of them.
Q. How many in a train?
A. I couldn't tell you; I was in the lower yard.
Q. Down there?
A. I say that I didn't handle over fifteen or twenty of them, at the outside.
Q. In what time, from the time Mr. Kohn was hurt, from the time that Kohn comes there, to the time that Kohn was hurt, you handled fifteen or twenty of these cars?
A. I say I handled them.
Q. About how many cars of this kind with these iron deadwoods on?
A. I don't remember of handling any of them.
123 Q. Are there more of these big long ones than of these short ones?
A. Yes.
Q. How many more?
A. There is a good deal more.
Q. Twice as many?
A. Yes; twice as many.
Q. Do you say there were twice as many cars came through the Wabash yards while Kohn was there employed that had these long deadwoods on than those which had these short buffers?
A. You take the different lines that come through the Wabash yard outside of their own cars, and I guarantee that two to one are handled with the high deadwoods; as to the others——
Q. Twice as many of the dangerous ones, the big, long ones, as of the others which are not so dangerous?
A. Yes.
Q. About how many of this other kind went through there during that time?
A. I couldn't tell you; I was not car-recorder, I was conductor.
Q. Two cars of this particular make, with the bumpers up above the draw-heads, can be coupled from below?
A. Yes.
Q. With safety?
A. Yes; I have seen that kind.

Q. But two cars of this kind (long deadwoods) cannot be coupled with safety.

A. No.

Q. They can with a stick?

A. Yes; with a stick.

Q. They can be coupled with safety by putting a little
124 block under the link?

A. I want you to answer my question.

Q. It can be coupled with safety by putting a little block under it, can't it?

A. You answer my question and I will answer yours.

The COURT: If you can, answer his question and gratify him.

WITNESS: When you get two cars together like that——

The COURT:

Q. You say this can be coupled with a stick if you have a stick?

A. If you have a stick long enough.

Mr. SMITH:

Q. Or you can get a little block under the link?

A. No, sir; you couldn't.

Q. You don't agree with Mr. Butler?

A. No, sir.

Q. But if two of these cars came together—one like this and one like this—the link can be guided from underneath?

A. If it is guided from underneath, it is all right.

Q. But if a man gets his hand up above he is liable to get it pinched, isn't he?

A. He is.

Testimony of Christopher Kohn.

Plaintiff, further to maintain the issues on his behalf, called as a witness CHRISTOPHER KOHN, who, first being duly sworn, testified as follows:

Direct examination by Mr. FORD:

Q. Where do you work?

125 A. On the Lake Shore at present.

Q. You are in the railroad business, are you?

A. Yes.

Q. How long have you been railroading?

A. About four years.

The COURT:

Q. Braking all the time?

A. Switching.

Mr. FORD:

Q. What railroads have you worked for?

A. The Wabash and the Lake Shore.

Q. When did you work for the Wabash?

A. I worked—you know when my brother was hurt I was working there.

Q. How long before that had you worked there?

A. I commenced there the 22 of February, 1886 or 1885. I couldn't say.

Q. Was it the year before Adam went to work?

A. Yes; it was all of a year, anyway.

Q. You worked for the Wabash right along, did you?

A. Yes; I worked there until last December.

Q. So you were working there all the time that Adam was there?

A. Yes, sir.

Q. Do you know about Adams being employed there when he was first hired?

A. Yes; I got him the job.

Q. Whom did you first speak to about it?

A. Mr. Clark.

Q. Who was he?

A. The night yardmaster.

126 Q. What, if any, conversation did you have with him about Adams' experience?

A. I asked Mr. Clark for the job for him, and he asked me if he ever railroaded before, and I told him "No," and he told me to tell him to come around.

Q. Did you ever talk with Mr. Clark after that about it?

A. Not to my recollection.

Q. How soon after you had that talk with Clark did Adam go to work?

A. It might have been a night or two after that.

Q. Where was Adam when you first saw him at work?

A. I don't know as I seen him working. I think I was working on a half day and a half a night.

Q. During the time that you worked there when did you work, night or day?

A. Half day and half night.

Q. What do you know, if anything, about their giving him any instruction or direction about how to do this work?

A. I don't think they did. I seen him come into the office, and he came out in about five minutes after he went there.

Q. At what work—yard—were you between April, 1887, and July?

A. I done the No. 5 elevator work in the afternoons, and I worked backwards and forwards in the upper and lower yards.

The COURT:

Q. Did you work in the same yard as your brother?

A. Part of the time.

127 Mr. FORD: It is admitted that the Wabash cars had no bumpers on them.

WITNESS: The Wabash had no bumpers.

Mr. FORD: No deadwoods?

Mr. SMITH: They had blocks just above the draw-bar.

WITNESS: I never noticed any deadwoods on them, unless they call that block on the top.

Mr. SMITH: They didn't have deadwoods, so called, but there is a head block that extends out up on the draw-head.

Mr. FORD:

Q. What is the fact about the Wabash cars?

A. They ain't got no deadwoods on that I can see; only a head block, where the draw-bar is fastened onto.

The COURT:

Q. Does that come out as far as the draw-bar?

A. No; the draw-bar comes out just as far as any other cars. It is just set on top that, same as this one here (referring to model with long deadwood).

Mr. FORD:

Q. During that spring and summer how many cars coming over the Wabash had these long deadwoods?

A. I never saw many of them. I never had occasion to couple many of them.

Q. Do you know the road at that time that had them in use?

A. I remember of seeing them on the D., L. & W.'s—a few

128 Q. That is the Delaware & Lackawan-a?

A. I guess it is. I won't swear to what it is.

Q. Where did they come from?

A. I couldn't say that.

Q. You don't know whether they belonged in America or Canada?

A. I couldn't say that.

Q. What other road besides the D., L. & W.?

A. The P. and R., I think, have got them.

Q. Where is the P. and R. road?

A. I couldn't say. I don't know where these roads are.

Q. How often did these cars with this kind of coupling apparatus come through the Wabash service while Adam was there—the two months and thirteen days?

A. In the two years I was there I don't believe I made more than ten couplings of them.

Q. Did you see the cars that Adam was hurt between?

A. No.

Q. What do you say about the difficulty of making the coupling with that kind of machine on it?

A. Well, if it had them off——

Q. I mean with them on, just as they are now.

A. A man couldn't couple that with his hand unless he got his hand caught.

Q. Why?

A. Because them things would catch him—them arms; he has only got about six inches to go.

Q. What is the trouble?

A. Them deadwoods would catch him.

Q. How do you couple with the little deadwoods and where do you put your hand?

129 A. You have got to put your hand down under the deadwoods.

Q. Or over them?

A. Yes; or over them.

Q. Why can't you put your hand down under there?

A. You have got to lay down to it if you get to it; they come within eighteen inches, I should think, from the rail.

Q. From the rail?

A. They are about sixteen inches long.

Q. Up and down?

A. Yes.

Q. Could they be connected with a stick?

A. I suppose they could.

Q. How would they do that?

A. Hold the stick in there and leave it, and smash it if you had two of them together.

Q. What would you say as to that being a safe thing to couple?

A. It ain't no safe thing at all.

Q. Supposing a man had never seen one of those and didn't know how they operated, what would be the difficulty in his doing it with safety?

A. Well, he couldn't do it with safety.

Q. Is there any difference in coupling these with speed and safety in regard to the length of the link?

A. Yes; and according to how fast the car goes.

Q. Whether it is a short or a long link, I mean.

A. Yes.

Q. What kind of a link is that, substantially?

A. I should call it a straight link, I suppose.

Q. How long is an ordinary link in coupling?

130 A. I never measured it. I should say twelve or fourteen inches long.

Q. If a link is only ten inches long, would the difficulty of coupling be increased or diminished?

A. Taking that much off of the link, by putting in one draw-bar would make it that much shorter. Sometimes the hole in the draw-bar is back further than others; some has a flat pin and some a round pin that leaves the link sticking out that much more.

Q. If there is a difference in the height of the draw-bar—suppose one is five or six inches higher than the other and a coupling has to be made, does that make any difference?

A. You have got to hold it up with your hands; you can't put a plug of wood under that and hold it up that height; you have got to raise the link up if you can't shove it down far enough.

Q. Suppose the stationary car is four or five inches lower than

the approaching car and the link is in the stationary car, what is best to do?

A. You have got to raise up the link.

Q. Where does your hand go with reference to these big bumpers?

A. You have got to get down on your knees to do it.

Q. Then if the car rolls along you are on your knees?

A. Then you will get knocked down.

Q. Did you ever make a coupling with these big bumpers—those long fellows that come down?

A. Oh, I have made some. I don't just remember of making many. I don't believe I have made—well, I believe I have made eight or nine.

Q. How long have you been a switchman?

131 A. About four years; three years in the Wabash and one year in the Lake Shore.

Cross-examination by Mr. SMITH:

Q. Did anybody ever give you instructions as to how to couple cars with long deadwoods?

A. No, sir.

Q. Do you mean to tell the jury that a man can't couple those with the hand without getting caught?

A. Not where there is two of them—he can't do it.

Q. He can't do it?

A. No, sir.

Q. You say you have coupled them together about ten times in your experience. How did you do it?

A. I would stand back and take a club.

Q. You always take a club?

A. Not always. I sometimes set the pin and let it couple itself.

Q. But you never put your hand in?

A. No, sir.

Q. Why not?

A. Because it would catch my arm.

Q. You think it would catch your arm?

A. I know it would.

Q. Was it so plain that you would know that it would catch your arm?

A. If you had worked at it as long as I did you would know it.

Q. How did you know the first time—know about not putting your hand in there?

A. It stands to reason; it did to me.

Q. You took a stick or else set the link and let it make itself?

A. Yes, sir.

132 Q. How many cars with this kind of bumper came through the yard during the few months that Adam was in the yard there?

A. I can't tell.

Q. The bumper of the Merchants' Despatch was substantially like this model?

A. Yes.

Q. About six inches square?
A. Six or eight.
Q. And is iron?
A. Yes.
Q. They came down to about the level of the draw-bar?
A. Yes; they may be a little lower.
Q. Can't you couple two of them of this kind?
A. If that was a M. D., with a bull-tongue link, they would couple themselves.

The COURT:

Q. Suppose that was one of the New Jersey cars, couldn't you reach your hand in there and lift it up?
A. There would be danger; you have got about twenty-five pounds to lift up.
Q. Would your hand be hit?
A. Yes; the higher you raise it up the worse it is. You have got to get down under and shove it up; you can't get hold to lift it up.

Mr. SMITH:

Q. If you get your arm above in attempting to lift it up you are pretty sure of getting caught?
A. Yes, sir.
Q. But if you got under and shoved it up you wouldn't get caught?
133 A. If it is coming fast you can get caught?
Q. Suppose it was going slow?
A. You would probably get out and maybe you wouldn't; you have got to run your risk.
Q. It is a dangerous occupation—switching cars?
A. Well, it is.
Q. You say you think a straight link is the safest?
A. You take two M. D's., they will couple themselves, and thus they are safe.
Q. You think this is the safest car to couple to?
A. No, sir; the Wabash cars or the Lake Shore is the safest cars you have, because you have got lots of chances to get out. If a man makes a coupling he ain't agoing to stay there long enough for them to get caught.
Q. Did you tell Mr. Clark that Adam had worked in the blacksmith shop six years?
A. I might have; I wouldn't say. I recommended Adam as a sober man; that is all. I told him that he had never worked at railroading before.

Testimony of Henry Holland.

Plaintiff, further to maintain the issues on his part, called as a witness HENRY HOLLAND, who, first being duly sworn, testified as follows:

Direct examination by Mr. FORD:

Q. What is your business?
A. Railroading.
Q. How long have you been in the business of railroading?
A. About five years.
Q. What roads have you worked for?
134 A. For the Lake Shore and the Wabash.
Q. How long did you work for the Wabash?
A. About five months.
Q. What did you do—what kind of work?
A. I worked at switching on the Wabash.
Q. What do you do for the Lake Shore?
A. Car repairing and switching, both.
Q. How long at switching and coupling cars?
A. All together about two years and a half.
Q. Did you work for the Wabash Company at the time that Adam Kohn did?
A. I worked there when he was working extra, but I left there just before he lost his arm and he took my place steady. I worked there while he worked extra.
Q. You were there some time after he commenced working?
A. Yes.
Q. He commenced working in April. How long before he was hurt did you leave the Wabash?
A. About a month or two; I forget how long.
Q. That would be some time in June?
A. Yes.
Q. Did you work nights or days?
A. Nights.
Q. In what yard did you work?
A. Part of the time in the new yard and in the old. Well, I worked all over around there.
Q. Were you acquainted with the kind of cars which were being handled by the Wabash at that time?
A. Yes, sir.
135 Q. How was it about these cars being in use very generally there—with the big, long deadwoods?
A. Well, they didn't use but a very few of them. I worked five months and I didn't come across one where I had to couple two of them together.
Q. Did you become acquainted with what is known as the New Jersey Central cars?
A. Yes, sir; I know them when I see them.

Q. What other cars besides the New Jersey Central had these large deadwoods?

A. The B., L. & W., or some such a name as that, and the Lehigh Valley.

Q. While you were there how many of this kind (model) do you say you coupled?

A. I didn't couple any of them where there was two of them together.

Q. How many of them did you see in the service?

A. There wasn't but a very few that I seen; once in a great while you would see two of them there together with a car-load of iron, and they were coupled together and you wouldn't have to couple them.

Q. The smaller bumpers, how was it about them—many of them in use?

A. Not many of them.

Q. What did the Wabash have?

A. Nothing except a little block of wood. They have a strap fastened on the draw-bar to hold that draw-bar from dropping down. That is all that is on the Wabash.

Q. What proportion of the cars would you see while you were on the Wabash that had those long deadwoods?

136 A. Well, there was not many; I don't believe you would find over five or six of them there in a week when I was there.

Q. Have you ever had any experience in coupling cars with these long deadwoods on them?

A. Since I have been on the Lake Shore I have found them coming together in that way, but I never went in between them when I seen them.

Q. What do you say to this jury as to the danger or difficulty of coupling these cars over and above the ordinary car?

A. They are not safe.

Q. Why?

A. There is no way to get at them and make the coupling unless you have a big club and keep outside of the cars.

Q. How would you do it?

A. Take it and stick it in there, and if it mashes up it is all right. I wouldn't put my arms in there for nothing.

Q. If you were going to use your arm, how would you do?

A. There is no way of putting your arm anywhere around that deadwood for to get two of them together; there is no way of getting it out unless you put a stick in there and let it mash; once in a while you can put the link in there where it is level and let them come together, but you can't do that when they are of different heights; you have got to lift the link up.

Q. Suppose the draw-bar of the coming car was three or

137 four inches higher than that of the stationary car?

A. Then the link would have to go over the top and you would have to raise the link up so high or get the draw-bar raised up, and then you have to have a club to make the coupling.

Q. How about the ordinary Wabash cars?

A. There is no danger about that; there is nothing about these; you take an ordinary car like that (referring to small deadwood), you can make that coupling by getting down under it; if you get your arm straight it will catch half of your arm.

Q. Even on the Merchants' Despatch cars?

A. Yes.

Q. How could you get under this to couple the big New Jersey Central car?

A. There is no way of getting to that at all; it is a dangerous coupling.

Q. Is it a coupling generally in use by the Wabash—was it at the time Adam worked there?

A. No; it is not.

Q. You spoke about how you would have to couple those with a stick; how do you get at that information—suppose you knew nothing about coupling?

A. I have watched it on some cars to see how they went together.

Q. You learned that from experience?

A. Yes; nobody told me nothing about them.

Cross-examination by Mr. SMITH:

Q. How long have you been switching?

A. About five months for the Wabash.

Q. Before you worked for the Wabash?

A. No, sir.

138 Q. What company were you working for?

A. The Lake Shore.

Q. Are you any relation of Mr. Kohn?

A. I am his cousin.

Q. You say that you have had occasion to couple cars with these long deadwoods?

A. Yes.

Q. In your experience in switching on the Lake Shore?

A. Yes, sir.

Q. How did you couple them?

A. I either had time enough to set the link so that it would make itself, or had to get a big club, and if I couldn't have time to get a club I would let it go.

Q. When two of these came together?

A. Yes, sir. I wouldn't put my arm in there for nothing. How are you going to get your arm out again when they are within a a short distance?

Q. When you did couple them, how did you do it?

A. With a club, or I would take and set the link so it would make itself.

Q. In every case?

A. Yes, sir.

Q. You never coupled with your hand at all?

A. No, sir; I never put my fingers inside of them at all.

Q. You have had occasion, I suppose, very frequently to couple cars with the iron bumpers like the Merchants' Despatch cars?

A. Not frequently, but I have coupled them by running the risk of losing my arm on them. I have tried to.

139 Q. You have coupled them with the hand from underneath?

A. Yes; but you have got to be very careful and go and get down under them. If you happen to get your arm in there straight it will crush your arm.

Q. If you get your arm above the level of the draw-bar?

A. Yes, and they ain't straight; they are more rounding on the bottom.

Q. Underneath here?

A. Yes.

Q. And they come down to about this level?

A. Yes, but — half of them the bolt works loose in the center, and they will turn up cornerways. You have got to watch them carefully.

Q. You have made couplings on a good many of them with the hand from underneath?

A. I have made some of them.

Q. In your experience, what proportion of the cars that came through the Wabash yards while you were there, in May and June, 1887, had buffers on of about this kind?

A. Not many; once in awhile they would run across one.

Q. You have had occasion, then, to couple cars like the Merchants' Despatch with those having these long deadwoods?

A. I don't know as I have. I have had them there with the Empire Line, but not with the Merchants' Despatch. The Merchants' Despatch has a bull-tongue in the center, which is tight; you can't change that kind from one car to another. I have had them with the Empire.

140 Q. How would you couple these two cars (models), the link to be passed into the small draw-head?

A. If you get down pretty well and watch yourself that the car don't come too fast, you can make it by a close escape, but you have got to watch yourself very close.

Q. You have got to watch yourself very carefully?

A. Yes; to make it with them timbers on, but if the draw-bars is higher than one another, then it ain't safe to make.

Q. It is a dangerous business?

A. It is a dangerous piece of business; that is what it is.

The COURT:

Q. You could see that it was dangerous?

A. Yes; but you take them long bumpers, in working out nights it is hard to see them; you think it is one of them end blocks. In the night the lamp don't throw light enough for to see them very handy.

Mr. SMITH:

Q. You can see them in the daylight?
A. Yes.

The COURT:

Q. You would have to have the trouble to see whether there were bumpers?
A. You have got to watch them pretty close to see them.
Q. You could see that there were bumpers on?
A. Yes, sir.
Q. Then you would have to take care?
A. Yes; you have got to watch out for them then.

141 Mr. SMITH:

Q. You say you never went in between two cars to couple with the hands, both of which had these long deadwoods?
A. No, sir.
Q. What cars—of what companies—had these long deadwoods on?
A. The Lehigh Valley; the D., L. & W., and the Central Railroad of New Jersey. There is another, I forget what.
Q. The P. and R. cars?
A. I forget; there are three or four different companies that has got them.
Q. How about the New York, Lake Erie and Western cars?
A. I don't know about them.
Q. How many cars, in an ordinary Wabash train of thirty-five cars, at the time you worked there and Adam Kohn worked there, would be from foreign companies?
A. Some nights there wouldn't be but two or three in a train and sometimes six or seven. You couldn't tell. They would run up—some nights there wouldn't be any to amount to anything.
Q. The great majority of them were Wabash cars?
A. Yes; that you had to couple; certainly.

Re-examination:

Q. You work for the Lake Shore now?
A. Yes, sir.
Q. How long have you been with the Lake Shore?
A. Ever since the 20th of last December.

142 Q. What is the rule or regulation of the Lake Shore in regard to cautioning their brakemen about injury around the cars?

Mr. SMITH: You must ask the custom of all the railroads, you cannot give evidence of one railroad. You may give what is the usual custom of railroads all over, taking them in a body.

Mr. FORD: This man has not worked on all the railroads.

The COURT: Then he is not a competent witness on that point.

Mr. FORD:

Q. How many railroads have you worked for?
A. The Wabash and the Lake Shore.
Q. Do you know what the custom is on your road?
A. Yes, sir, I do.

The COURT:

Q. All the railroads?
A. Why, the understanding is they are supposed to give a man a stick or something to supply his hands with, or tell him something about the railroad, if they get a new man.
Q. They are supposed to do it?
A. Yes.

Mr. FORD:

Q. Do they?
A. The Lake Shore gave me a stick and the helper told me to look out for deadwoods.
Q. Did they have rules up in the shanties?

(Objected to.)

A. No, sir, they didn't.

The COURT: No matter about their rules; the jury must
143 not consider that.

Testimony of Frank Henimger.

Plaintiff, further to maintain the issues on his part, called as a witness FRANK HENIMGER, who, first being duly sworn, testified as follows:

Direct examination by Mr. FORD:

Q. You are at work for the Wabash road now?
A. Yes, sir.
Q. How long have you worked for the Wabash road?
A. About nine years.
Q. You are now in the employ of Mr. McNulty in the present management?
A. Yes, sir.
Q. What is your business?
A. Switching at present.
Q. How long have you filled the position of switchman on the Wabash road?
A. Pretty near five years.
Q. Did you switch anywhere else before that?
A. No, sir.
Q. All your railroading then has been for the Wabash?
A. No, sir.
Q. How long have you been railroading all together?
A. Nine years.

Q. Where were you employed at the time Kohn was hurt?
A. At the Wabash yards.
Q. What part of the yards?
A. The Wabash yards—they have only one yards, I guess.
144 Q. They speak of the upper and lower yard.
A. Whereever they see fit to send me; sometimes above. Sometimes I work in the upper yard, and sometimes in the lower one. When he was hurt I was at work in the upper yard.
Q. In the same yard where he was in?
A. Yes.
Q. Were you — day or night at that time?
A. On night at that time.
Q. Were you in one gang?
A. Yes, sir.
Q. Where were you when he was hurt?
A. I was on the hind end of the string of cars.
Q. Did you see anything of his being hurt until it was over?
A. I didn't until he was hurt.
Q. How soon after he was hurt did you get there?
A. I should judge about one or two minutes.
Q. Did you see these two cars between which he was hurt?
A. I saw them; yes, sir.
Q. What kind of cars were they?
A. Well, if I ain't mistaken, one was a dairy-line refrigerator car, and the other one a Central Railroad of New Jersey.
Q. Is that the same as the Merchants' Despatch, the dairy-line refrigerator car?
A. Yes, sir.
Q. Did you examine the coupling between those two cars?
A. No, sir.
145 Q. You are acquainted with the form of deadwoods of the New Jersey Central?
A. Yes, sir.
Q. How long have you been familiar with that kind of a car?
A. Ever since I commenced to switch cars.
Q. What is the fact as to that kind of construction of car being generally in use, or whether it is disappearing from use nowadays, whether it is going out of style?
A. I see as many of them now as I ever did.

The COURT:

Q. How many of them were running then at that time?
A. I couldn't tell you that.

Mr. FORD:

Q. Will you state to the jury whether it was a common thing to have these New Jersey Central cars in service while Mr. Kohn was there?
A. It was a very common thing to couple these kinds of cars together for me.

Q. I mean to have them on the Wabash service when he was there—during those two months and thirteen days?

A. I can't answer about that part of it. I have handled a great many of them cars.

Q. During the spring that he was there, what would you say as to whether it was a common thing or an unusual thing to have one of those cars in the service?

A. I couldn't say anything about in regard to the Central Railroad of New Jersey, but it was a common thing to have those
146 deadwoods in the yard of the same kind on other cars.

Q. What other roads had them?

A. The B., L. & W., the P. and R.—that is, the Pittsburgh, I think—the Philadelphia and Reading, and the Lehigh Valley; I think that is all.

Q. Do you say it was a common thing to have the cars of the Lehigh Valley go over your road?

A. Yes, sir.

Q. Ain't that a coal country—loaded with coal?

A. They handle considerable coal. They used to come in loaded with iron occasionally.

Q. What do you say about the difficulty of coupling these cars compared with the Wabash; I understand the Wabash has no bumpers?

A. No, sir.

Q. How long was the bumper of the New Jersey Central?

A. I didn't take notice of that one, but if it's like all the rest it was, I think, something smaller than that (referring to model).

Q. How long up and down?

A. About fourteen inches.

Q. Is there any particular danger attending the coupling of an ordinary Wabash car where there are no bumpers?

A. There's danger, I guess, between any cars.

Q. I mean any unusual danger.

A. No, I don't think there is.

Q. Where do you put your hand?

A. On the link and enter the link and then take your hand away.

Q. There is nothing to interfere with you?

147 A. No, sir.

Q. How do you couple when they have got these small six-inch deadwoods on?

A. Put the link right into the draw-bar and let the pin drop.

Q. Suppose the link is in the stationary car and the car is coming down and they are of the same height?

A. If the link was in this car, I would want the link in the other car.

Q. Supposing it was in there and you couldn't get it out?

A. I would raise the link up on the other car and let the pin drop as soon as it entered.

Q. What would you do with your hand?

A. Take it away.

Q. Where would you have your hands with reference to the deadwoods?

A. Right in between them.

Q. You considered that a proper place to put your hands?

A. I have never done it in any other way.

Q. You wouldn't put your hand over or underneath the deadwood?

A. No, sir; it would be impossible to do it.

Q. Supposing your link is stationary and the approaching car—the drawbar is five or six inches higher than that car, would that increase the difficulty of making the coupling?

A. There is generally one or the other of them higher or lower; there are hardly ever two cars of the same height.

148 Q. Supposing one is four or five inches higher than the other?

A. They are different kind of cars and, as a matter of course, they were of different heights and build.

Q. You have not answered my question. When one is four or five inches higher than the other what then?

A. You have to raise the link up.

Q. Does that increase the difficulty of making the coupling?

A. I don't know where it would. You have to put your hand in there anyhow. As long as you have got to put your hand in there you might as well raise it up. It won't take any longer to raise it five inches as an inch.

Q. How much will that weigh?

A. About four or five pounds.

Q. When you come to one of these valleys how do you manage them?

A. In the same way. You put your hand right in them.

Q. Between the faces of these draw-bars and get hold of the link and guide it into the approaching draw-bar?

A. Yes; that is all the way you can do it.

Q. Can't you do it with a stick?

A. Yes; if you can get one, but you would be equally as safe, I think, with your hand. I never use a stick.

Q. How would you do it?

A. I would raise the link. That is the only way I ever coupled a car of that kind.

149 The COURT:

Q. You don't pretend to tell the jury that you would put your hand right between the bumpers?

A. That is the way I always couple them. I have coupled for five years.

Q. You never got caught?

A. No, sir.

Q. If the bumpers came together you would get caught?

A. The link projects out between eight and ten inches in which you can enter it into the draw-bar and take your hand out—at least eight inches before. They don't come together. The link has to

go into the other draw-bar before they strike together. That would leave six or eight inches.

Mr. FORD:

Q. They go together that way (illustrating with models)?

A. Yes; but now you see the link is entered. You have got to get your hand in there. When you see the link is in you have got to get your hand out. That is the only way you can make it.

Q. How far is that pin hole from the end of the draw-bar?

A. I should think about three inches.

Q. As soon as you get in far enough beyond the hole then the pin falls?

A. You don't stay in until the pin drops.

Q. You have got to keep your hand in there until the end of the link gets into the draw-bar?

A. That is all the way you can make it.

150 Q. You have got to get out of there while that link is going three inches?

A. Three inches? It leaves a space of eight or nine inches after you get the link entered.

Q. What makes it go down—the pin?

A. It is the jar.

Q. You have been coupling about nine years; what do you say as to that bumper with the apparatus on being an ordinarily safe machine to couple?

A. Well, a fellow would have to be careful in coupling them.

Q. What?

A. A fellow would have to be careful.

Q. What do you say as to this being more or less dangerous than the ordinary Wabash car?

A. I would say it would be more dangerous.

Q. What do you say as to its being more or less dangerous than the M. & D. cars?

A. They are both dangerous cars.

Q. These, I understand you, could reach over or under?

A. Under, I should think.

Q. And that would decrease the difficulty, wouldn't it?

A. Yes; I should think it would.

Q. Then what would you say as to the comparative danger of all these kinds of cars—that is, with the other—whether this is more dangerous; and, if so, to what extent?

A. I never felt any danger——

151 Q. No; I want your judgment as a switchman; you boys never feel it until you are smashed up; but I mean your judgment as a practical railroad man.

A. A man would have to be careful in coupling.

Q. Would you say that would be an unusually dangerous machine?

A. I don't think it is.

Q. What?

A. I don't think so.

Q. You don't think so?
A. No, sir.
Q. What would you say of a man of only two months' experience in his life in railroading being able to manipulate that without any instructions or cautions or directions—being able to manipulate a coupling of that kind with safety, even with the best of care?
A. If he didn't use good judgment I should think it would be dangerous, if he didn't use great care.
Q. As to using care, what would you say as to the necessity of having more or less experience and knowledge of the operation of these cars, not only care, but experience?
A. I suppose it is necessary for any of us to have experience at anything.
Q. Ain't it more necessary in this business than some others?
A. No, sir; I don't think it is.

The COURT:

Q. Looking at it, you would see what the danger was?
A. That is the way I look at it.

152 Mr. FORD:

Q. Supposing a man had never coupled one of those cars in his life and had never seen the two come together, do you say he would by merely looking at that apparatus comprehend his danger?
A. I think he ought to.

The COURT:

Q. Do you mean that he ought to see?
A. Yes, sir.

Cross-examination by Mr. SMITH:

Q. It was perfectly light when this accident happened, was it not?
A. Yes, sir.
Q. As light as it is now?
A. Yes, sir.
Q. You were at the end of the train?
A. Yes, sir.
Q. About how many car-lengths from these two cars?
A. I should think about eleven or twelve cars.
Q. How was your attention first called to the fact that he was injured?
A. I walked over the train and let off the brakes. The rear car was an oil tank. I got down on that and let off the brake and waited for a minute. I felt the jar of the cars when they came together—a slight jar. I waited about half a minute and thought they ought to be backing up. I looked around to see what the delay was and I saw Mr. Butler holding Mr. Kohn.
Q. Saw them alongside of the train outside?
A. Yes, sir.

153 Q. You could see them perfectly from where you were?
A. Yes.
Q. Did you examine the coupling arrangement and the bumpers after the accident?
A. No, sir.
Q. You wouldn't be able to state whether these draw-bars were about on a level or whether one was a little above the other?
A. No, sir; I couldn't.
Q. Did you see the bumpers—the deadwoods.
A. I couldn't say in regard to that, because my attention was drawn to him. I didn't think of them at that time.
Q. You say these long bumpers are used on the Central railroad of New Jersey, the Philadelphia and Reading, the Lehigh Valley, and the Delaware, Lackawana & Western?
A. Yes, sir.
Q. All of those cars came frequently through the Wabash yard at or about that time, didn't they?
A. Yes, sir.
Q. You had occasion quite frequenty to couple cars with that kind of deadwoods?
A. Yes, sir.
Q. You had?
A. Yes, sir.
Q. Did you use a stick in doing it?
A. I never used a stick in my life.
Q. As I understand your statement, the link comes out about six inches from the face of the deadwoods and you thought you could get your hand out after the link entered the draw-bar
154 and before the bumpers came together?
A. I don't think anything about it; I have done it lots of times; that is the way I always do it.
Q. How many couplings have you made of these cars with these long deadwoods?
A. I couldn't tell you; I have done it a great many times.
Q. How often did you have occasion to do it in the course of two months?
A. Probably five hundred times.
Q. I suppose it is somewhat more dangerous to make a coupling with deadwoods of this kind than it is where there are no deadwoods?
A. Yes, sir.
Q. Because there is more danger of getting your arm in between the deadwoods?
A. Yes, sir; and the difference is that you have to use more care.
Q. If you attempted to make a coupling with these than you did with the other kind?
A. Yes.
Q. And you always did exercise more care?
A. Yes, sir.
Q. Did anybody ever give you any instructions about how to make a coupling with that kind of deadwood?

A. No, sir.
Q. You can see for yourself that you have got to be more careful?
A. Yes, sir.
Q. It is plain that a man has to be more careful, isn't it?
155 A. I think it is.

Testimony of John Shay.

Plaintiff, further to maintain the issues on his part, called as a witness JOHN SHAY, who, first being duly sworn, testified as follows:

Direct examination by Mr. FORD:

Q. What is your business?
A. Yard clerk.
Q. What are your duties as yard clerk?
A. To take a record of the number of cars and the seals and mark them, &c.
Q. Have you ever switched any?
A. No, sir.
Q. Were you yard clerk at the time that Kohn was hurt?
A. Yes, sir.
Q. How long had you been doing that duty before that?
A. I had been working in the yard about seven years.
Q. What is your duty in connection with cars that go into freight trains when they are made up?
A. I take a record of them.
Q. What is that—taking a record of them?
A. Of the numbers and seals and the initials.
Q. Do you take the kind of car and what road it belongs to?
A. Yes, sir; and the initials.
Q. The initials are of the road it belongs to?
A. Yes, sir.
Q. When do you take it—before it is put into the train or
156 after?
A. Generally before and after.
Q. In your experience have you become acquainted with the New Jersey Central cars?
A. Well, I have seen a good many of them.
Q. Where have you seen them?
A. In the Wabash yards.
Q. Did you take the numbers of these cars at the time that Kohn was hurt?
A. Yes, sir.
Q. What cars were they?
A. Well, I didn't see—I was told they were the cars.
Q. Did you see them in the string?
A. I marked the trains and I seen them in the string of cars.
Q. What cars were they?
A. I was told.

Q. Not what you were told, but the ones that you saw.

A. I saw that they were the Central of New Jersey and a Merchants' Despatch. I saw the cars and was told that they were the ones that hurt him.

Q. Where were they?

A. In the old yard.

Q. Up around the round-house?

A. Yes; opposite the round-house.

Q. Is it a general thing or an unusual thing to have one of those cars of the Central Railroad of New Jersey in the service?

A. I have seen them quite frequently in the yard.

The COURT:

157 Q. How many in a month?

A. Sometimes there——

Q. A half dozen, three, or two, or one?

A. I couldn't say exactly, but I have seen them. I have seen sometimes that they are pretty thick around, and other times——

Q. Speak loud.

A. Sometimes there is a good many around and sometimes you don't see them.

Q. How many, on the average, of the Jersey cars?

A. I should say sometimes ten or twenty a month; maybe more or maybe less.

Mr. FORD:

Q. How was it at the time that Adam was working there—about the same?

A. Yes; as near as I can tell.

Q. What is the usual make-up of trains on the Wabash, their own cars or foreign cars?

A. Both. It is usually Wabash cars. Sometimes we get more foreign cars than Wabash, but, as a general thing, they are Wabash.

Q. Do you know what cars were in use that came over your line aside and independent of the New Jersey Central which had these big deadwoods, or didn't you observe them?

A. I have observed them on lots of other cars.

Q. You are working for the railroad now still?

A. Yes, sir.

Cross-examination by Mr. SMITH:

Q. Did you observe them on the P. and R.?

A. I have seen them on the cars.

158 Q. On the Delaware, Lackawana & Western cars, were they?

A. Yes, sir.

Q. And the Empire Line cars used them, didn't they?

A. Yes.

Q. And the Central Railroad of New Jersey?

A. Yes, sir.

Q. To the best of your belief, you say you saw about ten to twenty of the Central Railroad of New Jersey's in a month come through the yard?

A. Maybe that many and maybe more and maybe not so many.

Q. That is the best of your belief?

A. Yes.

Q. Is it your duty to take the numbers of the cars as they come in?

A. Yes, sir.

Q. Were you a night man or a day man?

A. A night man.

Q. Is there a separate clerk for each yard?

A. I am the only man nights for trains both ways.

Q. Where is your station?

A. In the upper yard.

Q. Is there any number taken in the lower yard?

A. Yes, sir; an interchange man.

Q. A Lake Shore man?

A. No; a Wabash man.

Q. Who does that work?

A. Frank Dwight is the night man. Peter McGraw does that in the daytime.

The COURT:

159 Q. Is there a clerk in both yards?

A. Yes, sir.

Mr. SMITH:

Q. Should you say, according to your experience and from your observation, as many as ten to twenty of the Central Railroad of New Jersey cars came in the course of a month? How about the Philadelphia and Reading—how many of those cars came in?

A. I don't know, but they are a little more frequent than the Central of New Jersey.

Q. How about the Lehigh Valley?

A. Well, there is something about the same number.

Q. About the same as the P. & R.?

A. Yes; sometimes they are not quite so plenty.

Q. How about the Empire line?

A. Well, that is not handled very much?

Q. They don't come so often?

A. No, sir.

Here the plaintiff rested his case-in-chief.

Testimony on Behalf of Defendant.

Testimony of Sam'l Grasse.

The defendant, to maintain the issues on its part, called as a witness SAMUEL M. GRASSE, who, first being duly sworn, testified as follows:

Direct examination by Mr. SMITH:

Q. What is your employment?

A. I am yardmaster for the Wabash.

Q. What are your duties as yardmaster?

160 A. They are various, but the general duties are directing the business of the yard.

Q. How long have you been railroading?

A. Well, it is seventeen years.

Q. What part of the work have you done?

A. It is various; I have been brakeman, conductor, and yardmaster.

Q. What experience have you had in coupling cars?

A. Well, considerable.

Q. How much?

A. Well, about—I was braking two years—about three years I was braking.

Q. And it was a part of your duty to couple cars?

A. Yes.

Q. Where?

A. Well, the Wabash.

Q. Whereabouts for the Wabash?

A. For about two years on the road as a brakeman.

Q. Were you yardmaster at the time that Kohn was hurt?

A. I was day yardmaster.

Q. And you had charge of the day men?

A. Yes, sir; and the night men both—that is, as general yardmaster.

Q. Who had special charge of the night men?

A. Ed. Clark.

Q. You didn't employ Mr. Kohn yourself?

A. Not to my knowledge I didn't; no, sir. I don't know that I had anything to do with the employing of Mr. Kohn, anything further than that I accepted him as an employé after he he was employed.

161 Q. Did you have general charge of the yard at the time Mr. Kohn was injured, as to the cars which came in and went out?

A. Yes, sir.

Q. And the making up of trains, does all that business come under your supervision?

A. Yes, but not at night. I was not there at night; Mr. Clark had charge of the night force.

Q. Have you the means of knowing about how many cars came through the Wabash yard in the two months prior to the time Mr. Kohn was hurt, which had deadwoods on one or the other of these cars (models)?

A. I could make an estimate.

Q. What is your estimate?

A. Well, sir, I judge that about one out of every twelve cars are supplied with one or the other.

Q. And on what do you base your estimate?

A. Well, in fact, the records in one place, taking the class of cars that passed through the yard and knowing that they contained this attachment—that they are of companies, that they are on the cars.

Q. Have you gone over the records of the company to see what cars came through the yard which would probably be provided with one of these attachments?

A. Yes, sir.

Mr. FORD: I am objecting to his giving any records; the reports themselves are the best evidence.

Mr. SMITH:

Q. What do you base your estimate upon?

A. Records of cars passing through the yards.

162 Q. Have you made a personal observation of these cars so as to know about how many in your own experience?

A. I have at various times since this matter has come up, but not before.

Q. At the time that Adam Kohn was hurt, what is your best judgment as to the number of cars that came through at that time on the average which would be provided with one of these buffers?

A. I would say about one out of every twelve.

Q. About how many cars a day of these freight cars come through the yard—of trains to be made up—going either way—east bound or west bound—about that time?

A. I could say that I could tell better during the whole time that he was employed.

Q. During the whole time?

A. There was about twelve thousand cars passed through each way.

The COURT:

Q. During the two months, you think?

A. Yes, sir.

Q. And about one thousand of those were with the bumpers?

A. Yes; about one thousand.

Mr. SMITH:

Q. About what proportion of these twelve thousand cars were foreign cars other than Wabash cars?

A. It would be rather guess-work to tell, but I should judge that out of the twelve thousand there surely was five thousand foreign

cars during the two months and a half, and that estimate would be Wabash cars.

163 Q. What sort of bumpers, if any, are the Wabash cars provided with?

A. They are provided with the common bumpers.

Q. Common bumpers?

A. A common draw-bar; but they are the common deadwoods properly.

Q. And so called?

A. No, sir.

Q. What is there to break the force of the shock on the draw-bars as they come together?

A. Nothing.

Q. Isn't there a spring underneath?

A. Yes.

Q. So that the draw-bars give when they come together?

A. Yes; I think there is a spring under all of them, if I am not mistaken.

Q. Do you know what the object of these deadwoods is?

A. I have never had any one tell me what the object of them is, but I judged from my own experience that they were to keep the shock of the car from the draw-bar.

Q. To relieve the shock of the car from the draw-bars?

A. Yes, sir.

Q. Do you know how many companies whose cars were going through the yard about that time had deadwoods of this large make?

A. Well, there was the Lehigh Valley and the P. and R.—Philadelphia and Reading—and the D., L. and W. I think the P. and R. and the Lehigh Valley were more numerous than the other cars.

164 Q. Do you know anything about the importance of this railroad system—of the Lehigh Valley and the P. and R.?

A. I am but very little acquainted with their importance.

Q. The Central Railroad of New Jersey are not so numerous?

A. No, sir.

Q. Are the deadwoods on them about the same as the others?

A. Just about the same.

Q. About how long are the deadwoods—up and down?

A. I would estimate them at about fourteen or fifteen inches—anywhere between fourteen and seventeen inches.

Q. Did you examine these two cars, the Central Railroad of New Jersey car and the Merchants' Despatch car, after Mr. Kohn was hurt?

A. Yes, sir; I saw them.

Q. Did you see the character of the deadwoods or bumpers?

A. Yes, sir.

Q. I will ask you if this model represents with tolerable accuracy the bumpers upon these two cars.

A. It does very much.

Q. Which one would this one represent?

A. That would be the New Jersey car.

Q. And this one?

A. Would be the dairy-freight line—the M. D. refrigerator, which had the Ames patent draw-bar.

Q. With a stationary link?

A. Yes, sir.

165 Q. Are you able to tell the jury where the bumpers on the Merchants' Despatch cars were with reference to the draw-head, above, on *on* the level, or below it?

A. The bumpers are above the draw-bar, just as they are in that case (model). I think that is a very fair sample of the car.

Q. And in the Central Railroad of New Jersey car the bumpers extended below the draw-head, did it, like this (model)?

A. Yes, sir.

Q. State to the jury whether these draw-heads were or were not about on a level.

A. To the best of my judgment they were very nearly on the level or about on a level, the draw-bars were.

The COURT:

Q. Then the Jersey was not any higher than the other?

A. A very little, if any.

Q. How many inches?

A. Of course it would be an estimate, but I should judge it was about two or three inches.

Mr. FORD:

Q. Or four inches?

A. No, sir; I don't believe it was four.

Mr. SMITH:

Q. Two or three inches—no more than that?

A. No, sir.

Q. When the cars came together—state to the jury whether or not the draw-heads are a little above one another when the cars come together.

A. Cars are not uniform. Of course, where railroads are
166 handling such a numerous amount of *of* all kinds of cars, one build will be a little bit higher or lower than the other. I have noticed that quite frequently, and I know we are building new cars at the present time that are higher than our old cars, simply because I presume the old cars have settled down in their bearings to some extent or the springs have given way in some way.

Q. What is the effect uniformly on trains in the yard as they are called upon to couple them?

A. Sometimes you find one train with the draw-bars all on a level, and then again you will find trains where about half the draw-bars would be a little higher or lower than the others; it is a frequent thing to find them in that way.

Q. How frequently?

A. I couldn't say.

Q. Half of the time will they be a little bit off?

A. No; I wouldn't say half the time; about one-third of the number of cars it might be.

Q. What would you say as to the comparative safety of coupling two cars with these long deadwoods compared with the Wabash cars which you are using to-day?

A. Those deadwoods, as a matter of course, are dangerous.

Q. They are dangerous?

A. Yes, sir.

Q. They are more dangerous to a switchman getting his arm caught than when they are not used?

A. Yes; as a matter of course.

167 Q. What would you say with reference to the precaution which a man would have to use in coupling cars, both of which are provided with these deadwoods, and the precaution which you would use in coupling cars which you are now using in the Wabash?

A. Oh, well, our cars are not dangerous cars to couple unless a draw-bar gives way, and then, as a matter of course, they are dangerous.

Q. Dangerous without deadwoods?

A. Yes, sir; and you take two of that class of cars, and they, I think, are dangerous, very dangerous, unless they are coupled as I understand they are coupled on roads using them generally.

Q. How is that?

A. I understand they couple them with a hook from the top of the car.

Q. From above?

A. Yes; I understand that this extension on the front end of the cars is placed there for the convenience of the men coupling the cars, and that they use hooks to couple them with.

Q. This little ledge in front of the car?

A. Yes, sir.

Q. How is it with reference to coupling with a stick?

A. Well, you could couple them with a stick, too.

Q. With safety?

A. Of course—that is only hearsay—the use of a hook from the top of that extension.

Q. Take two cars, the Central Railroad of New Jersey and the other, where there is an iron bumper above the draw-head,

168 could they be coupled with the hand from below?

A. Yes. I don't know why it could not be.

Q. In your opinion, would or would not there be more danger in coupling these two cars together (models) than it would be to couple two cars of the variety of the Merchants' Despatch?

A. I don't think there would be any difference, simply because there is the same bearing on both bumpers—the bearing is the same. Of course, the extension of the bumper below has nothing to do with this car, and therefore I claim that this bumper and a portion of this is all that comes together.

Q. It takes two to make a pinch?

A. Yes; and that fact that the draw-bar of that car is underneath the bumper would do away with the lower part of that and all the lower part of that that is below the level of the draw-bar.

Q. When you say this is very dangerous to make a coupling you mean to make a coupling where there are two cars of that variety?

A. Yes, sir.

Q. But you wouldn't say it would be very dangerous to make a coupling of these two cars?

A. Not very dangerous, but there is danger in coupling any cars where you have got to get in.

Q. And where there are deadwoods is it more dangerous than where there are not deadwoods?

A. Yes; to a certain extent—yes; but take the small deadwood, I am rather in favor of it.

Q. Why?

A. Simply because if the draw-bar gives way the deadwood will save a man from getting crushed.

169 Q. And if there were no deadwoods there?

A. If there are no deadwoods there, as a matter of course the cars are liable to come together.

Q. He would be certainly crushed if there were not any deadwoods?

A. Yes; unless the head blocks were thick enough to protect his body; he would have to be a small man for that.

Cross-examination by Mr. FORD:

Q. You have been in the railroad business how long?

A. About seventeen years.

Q. You have had during that time a large experience in coupling cars?

A. I have coupled cars about three years of that time; two years on the Wabash and one year outside.

Q. At the time of this accident you were yardmaster?

A. Yes, sir.

Q. And you hold that position now, do you?

A. Yes, sir.

Q. And you regard, in the light of your experience, these cars with these big deadwoods on as unusually dangerous cars to couple?

A. I consider them dangerous cars, as a matter of course.

Q. Unusually dangerous?

A. Well, they are not any more dangerous than any other class of car with the same kind of bumper.

Q. But it is a dangerous kind of machinery, isn't it?

A. Well, it is, as a matter of course. I said it was dangerous.

170 Q. Wouldn't it be more dangerous to an inexperienced man who had just commenced on a railroad and didn't know anything about coupling cars?

A. I don't know; I couldn't say; only as to my own feelings in regard to the matter, if I should see two of those cars coming together I should get out of the way and let them come together. I

undoubtedly would—that is, I might not in my younger days, but with my experience now I should get out of the way of them.

Q. Don't that come largely from your seventeen years' experience as a railroad man?

A. The older a man is the more he finds out about these things; but at the same time, if I had come in contact with the same draw-bars when I was in the service only a month, if I felt then as I do now, I never would go in to couple them.

Q. You hardly know how you would feel?

A. I know now that I wouldn't stay in.

Q. Suppose you had been coupling for a couple of months and found these cars coming down there and felt that it was your duty to make the coupling and didn't know anything about them except as you could see from the form of them, what would you think was your duty then?

A. I should stay out.

Q. And not make the coupling?

A. No, sir; we don't require men to make couplings.

Q. I am not asking that; I am asking what a man of ordinary care and with the limited experience that this man had would do.

A. Then I should stay out of it; I never run my neck into danger if I know it positively.

171 Q. You say the way these cars are coupled, a man stands on here with a hook?

A. Yes; that is only hearsay.

Q. Gets down here with a hook and raises this up?

A. Yes.

Q. You never furnished any of your men with hooks?

A. No, sir.

Q. Nor never told a man when to get onto those cars?

A. No, sir.

Q. Nor gave him any instructions to that effect?

A. No, sir.

Q. Nor cautioned him about any of these cars coming in there?

A. It never came in my way to caution him.

Q. Did you ever caution Mr. Kohn or give him any instructions about going in between these foreign cars?

A. No, sir.

Q. You knew they were being used and were more dangerous than your own cars?

A. That is all right; we hire men.

Q. But that is a fact, ain't it?

A. Yes.

Q. Your cars with just a block over the draw-bar is not a dangerous coupling, is it?

A. It is an easy coupling made, but then at the same time it is dangerous. We do not claim that the coupling of cars is not dangerous in all of its stages.

Q. These cars with the small deadwoods on, which you think is an element of safety on the cars, is it easy to couple them?

172 A. By reaching under; yes.

Q. And the raising up the link and putting your arm under these heavier draw-bars to guide it under would be comparatively safe?

A. Of course it would.

Q. And if your hand was down there the connection would be above your hand if they came together?

A. Yes.

Q. If you had a big one to run down here it would not be so?

A. When we look at these models we look at a very small portion of the end of the car, but I consider that those small deadwoods are an element of safety to a man.

Q. But they operate entirely different from the big ones?

A. Yes, sir.

Q. Take a man who never coupled one of these old cars in his life and had no experience whatever and you should bring a couple of those cars together in your ground up here, and a man—Adam Kohn or any other man—was required to couple them, how would he go to work to do it?

A. I wouldn't devise a plan by which he would do it. I couldn't do it.

Q. You are managing this business for this receiver and he has selected you to do it?

A. Yes.

Q. And during a certain part of the day you have charge of these men?

A. Yes.

173 Q. Now, if this car—you say that they came in here by thousands?

A. Not just exactly that class of cars.

Q. Foreign cars?

A. Yes; foreign cars.

Q. If there were two of these cars came together in your yard and a boy in the night or daytime was required to couple them together how would he do it?

A. It would be a good deal owing to how he thought about it.

Q. How would you require him to do it?

A. I wouldn't require him to do it. I would require him to make the coupling, as a matter of course, but I wouldn't tell him to stick his arm in the cars there.

Q. What would be the proper way to do it?

A. I should take a stick.

Q. How would you manage the stick?

A. Put it in and hold up the link.

Q. Put it in here?

A. There is a space of about six or eight inches before — that the link enters the draw-bar before the deadwoods come together.

Q. If a man never used a stick and never knew anything of a stick and never had any instructions about a stick how would he go to work to couple?

A. I wouldn't say, if a man didn't know.

The COURT:

Q. How about prop-ing up the link?
A. It could be done, as a matter of course, & is done.
Q. It certainly would be a safe way?
A. Yes, sir.

Mr. FORD:

174 Q. Isn't it a good deal easier to sit here and reason out how this thing might have been done than it is to advise what is to be done when you see it coming?
A. It is easier to sit and talk about anything than it is to do it, anyway.
Q. I don't understand you to say that you made particular comparison of the height of those draw-bars?
A. I didn't measure them.
Q. Has not your attention been called to it since this trial has commenced?
A. No. I looked at the cars at the time and examined the bumpers.
Q. Did you look to see about the relative height of the draw-bars?
A. Yes, sir.
Q. Which draw-bar was the highest?
A. The draw-bar of the Jersey Central may have been about two or three inches higher than the one in the M. D.
Q. That is as strong as you put it?
A. Yes, sir; but if you will let me explain—the draw-bar of the M. D. refrigerator has a mouth about that large—about eight or ten inches, somewhere near. Of course, that is an estimate. I never measured it, and this link is free and can be raised—the bull-tongue.
Q. A perpendicular opening?
A. No, sir; one end rises.

The COURT:

Q. How much play has that?
A. Eight or ten inches.

175 Mr. FORD:

Q. What is understood by a bull-tongue link?
A. That I don't understand. I have never heard it before. It is a coupling apparatus, and it is supplied in the Ames draw-bar.
Q. What is that Ames draw-bar?
A. It is a patent draw-bar; it was on this car.
Q. What kind of a draw-bar is that?
A. It is supplied with a coupling apparatus and it couples themselves when the cars come together. When there are two draw-bars of the same kind come together they are coupled without anybody going in between the cars at all, but when there is a car with a common draw-bar comes along against it, as a matter of course it has to be handled and coupled the same as the link.

Q. It is an improvement over the old plan?

A. Yes, sir; I would say so; but, of course, I wouldn't be held up in that statement all around.

Q. The link in the Ames draw-bar is fast?

A. It can be taken out, but it is stationary, in one sense of the word—it raises up.

Q. How would you take it out?

A. Of course, you would have to drive out the iron pin.

Q. You don't take it out as you do the old coupling?

A. No; that can't come out at all unless it is taken out by other means.

Q. Ain't it a fact that the pin that is fast in the Ames coupling apparatus is a shorter pin than the old-fashioned coupling?

176 A. No, sir; I think the link pin in the Ames draw-bar—if anything—I should judge, it was a little bit longer.

Q. I mean the link. I say the link in the Ames draw-bar.

A. The link in the Ames draw-bar, to my judgment, is a little bit longer. I would understand it a little bit more than the common link. There is a difference in common links. I think they vary about three inches; say from ten to twelve or fourteen inches.

Q. Which is the easier to make a coupling?

A. It depends. A great many times you can't make the coupling with either link, because it will not extend far enough to put the pin in. I would rather couple a long link than a short one, of course.

Q. Take the Ames apparatus. If you would have to lift up the link three or four inches it would be more difficult, wouldn't it?

A. No; it wouldn't be—that is, to take two common draw-bars coming together. You take two common draw-bars and put the link in them. A great many times you couldn't raise the link two or three inches, simply because the mouth of the draw-bar where the link enters is close enough to prevent you from raising it up unless the draw-bar is raised, but in the case of the Ames draw-bar there is eight or ten inches in the mouth where the link plays up and down.

Q. Raising up one end of the link wouldn't slip it up and down?

A. It extended back into the mouth of the draw-bar about twelve or fifteen inches.

Q. In slipping it up and down you would have to raise the whole link?

177 A. No, sir; only raise one end.

Q. Did you ever see Adam Kohn about the yards there at work?

A. I don't know as I ever did, because I—I was on daytimes.

Q. You didn't take any particular pains to look after him and see what he was doing or any of your men?

A. No, sir; I didn't do that.

Q. You let them take care of themselves?

A. As a matter of course, we have to. A man would have his hands full to look after 25 or 30 men to keep them out of danger.

Q. Let me understand a little more particularly what your duties as yardmaster are up there.

A. I direct the workings in the yard.

Q. You are the chief cook and bottle-washer?

A. You may call it that if you like.

Q. You don't have anything to do with registering the cars?

A. No, sir.

Q. Nor with keeping the numbers?

A. No, sir.

Q. You don't have anything to do with observing the particular kinds of cars which go into the trains, except in a general way?

A. In a general way; yes.

Q. You have no personal knowledge yourself that Adam Kohn ever coupled a single one of these big bumper cars, have you?

A. No; only the evidence that he lost his arm.

Q. In making that one coupling?

178 A. Yes; as long as he worked two months days I would naturally suppose he had coupled some cars. I was not with him right along.

Re-examination:

Q. You have spoken of the danger of the coupling together of two cars provided with these deadwoods. I will ask you whether or not that danger is an obvious and open one that anybody could see by looking at it.

A. As I said before, if I saw two cars coming together like that I wouldn't go in.

The COURT:

Q. Would an ordinary brakeman see the danger when he saw the character of the cars?

A. I don't see what would prevent him from seeing the danger.

Q. Was it so that every body could see it?

A. It is right on the face of the car—right on the front of the car.

Q. You said something about being his duty not to make the coupling. What is the usual custom about making couplings? Are they compelled to make them?

A. No, sir.

Mr. SMITH:

Q. Has it not often been that two or three efforts are made before the coupling is made?

A. Yes; oftentimes two or three times they come together too hard. I should reprimand a man for attempting to make the coupling if they went together too hard; we allow them to use their own judgment.

179 Mr. FORD:

Q. You have no printed regulations about that?

A. Our company requires every man to look out for his own

safety. I think that the rule is that each and every man shall look to the safety of his fellow-beings, so far as necessary.

Q. Where it that rule?

A. I don't know where it is now.

Q. In what shape is it in?

A. I think you will find it on the bulletin board and in the back of the general rules.

Q. When you hire a man do you put that book of rules in his hand?

A. They have given it since this man was hired. I don't know but what there was one at the time he was hurt.

Q. Did this receiver ever have a printed rule or direction to guide the duties of this man before this man was hurt?

A. We have a book of rules now.

Q. Did you before?

A. I couldn't say whether this book of rules came out before he was hurt or not.

Q. Did you, as yardmaster, authorized and put over these men, ever put any rule or instruction into their hands?

A. No, sir; I didn't.

Q. You let them "go, Gallagher"—let them take care of themselves?

A. No, sir; I never put any instructions into his hands.

Q. What is that book of rules?

180 A. There are a great many rules in it.

The COURT:

Q. As applying to brakemen?

A. It covers all employés. I don't know whether it hits switchmen or not.

Mr. FORD:

Q. You put that into the hands of your men now?

A. Yes.

The COURT:

Q. Is there any rule that tells how to couple cars?

A. No.

Mr. FORD:

Q. Isn't there a rule warning your men against the danger of coupling cars and requiring them to take plenty of time to see that they are in good shape before they attempt to couple them?

A. I don't know that there is any such rule.

Q. Then you don't know what the rules are?

A. No; I don't know as I do.

Testimony of Frank Howard.

Defendant, further to maintain the issue on its behalf, called as a witness FRANK HOWARD, who, first being duly sworn, testified as follows:

Direct examination by Mr. SMITH:

Q. What is your official position?
A. Car-builder.
Q. And you have general charge of the Wabash car shops here, have you?
A. Yes, sir.
Q. How long have you been a railroad man?
A. Twenty-five years.
181 Q. How long working for the Wabash?
A. About three years and four months.
Q. During that time you have had charge of their shops?
A. Yes.
Q. Are you familiar with the construction of the Wabash cars?
A. Yes, sir.
Q. Have the Wabash cars which were used at the time that Mr. Kohn was hurt any deadwoods, so called?
A. They have a deadwood, but not constructed in the way that these are here.
Q. Where were the deadwoods?
A. Right above the draw-bar, just across here, twenty-four inches in length, extending right above the draw-bars; taking the place of them bumpers. It is just a single block.
Q. How far does it extend from the edge of the car?
A. 25 inches.
Q. How far to the end of the draw-bar?
A. About eight inches.
Q. What is the object of this block on the Wabash cars?
A. It is for the protection of the draw-bar; also for the protection of the men.

The COURT:

Q. Is that wide enough to protect a man in coupling?
A. It is unless the draw-bar breaks; plenty.

Mr. SMITH:

Q. Do you know what these large deadwoods which some of the roads use are put on the cars for?
A. I think for the protection of the draw-bar.

The COURT:

182 Q. There is no protection to the car itself, is there?
A. Well, it is a protection to the car, because if a draw-bar should break the bumpers can come together.

Mr. SMITH:

Q. Do you know about how many of the roads of this country were, till about a year and a half ago, using those large deadwoods?

A. I couldn't say exactly how many, but several roads are using them, which have been mentioned here: The Pennsylvania, the D., L. & W., the Lehigh Valley, and this Central Railroad of New Jersey. I don't know anything about their cars at all.

Q. Are they using these large deadwoods as much now as they did a year and a half ago?

A. No, sir; I don't think they are. I think as they increase their rolling stock they use a different construction.

Q. You don't know how many of these cars used to come through your yards?

A. I couldn't give you any information on that point whatever.

Q. Did you examine these cars by which Adam Kohn was hurt?

A. No, sir.

Q. So that you have no personal knowledge of them?

A. No, sir; I didn't know that a man was hurt until my attention was called to it.

Q. Have you had any experience in coupling cars yourself?

A. No, sir; I never coupled a car in my life.

Q. I will ask you whether the question of the utility of
183 using these deadwoods upon the ends of railroad cars has been discussed among car-builders and the master mechanics of railways sometimes.

A. Yes, sir; it is.

Q. Has it been much discussed?

A. To a considerable extent; yes, sir.

Q. Is it still being discussed—that question as to their propriety?

A. No, sir; it is not.

The COURT:

Q. It is settled that they don't make any more that way?

A. No, sir; they are not building any more of that build.

Mr. SMITH:

Q. Do the Lehigh Valley new cars have them?

A. No, sir; they are similar to the Wabash.

Q. So that cars like those were built before two or three years ago?

A. Yes, sir; there is but one car built now—the master car-builders' car—which is nearly of the same construction as ours.

Q. So as to secure uniformity?

A. Yes.

Q. I suppose uniformity is the end of car-building?

A. Yes; but they use that right along. When they rebuild they build another pattern.

The COURT:

Q. Is it customary to use your machinery until it is worn so as to require rebuilding?

A. Yes, sir.

Cross-examination by Mr. FORD:

184 Q. You have told us just what I wanted to know about these old cars, and that is that the practicability of building cars in this style, with these bumpers on there or man-killers, has been discussed generally among the car-builders of the country, has it?

A. Yes, sir.

Q. How long ago did that discussion take place?

A. That has been agitated for every year, say, three or four years back.

Q. Three or four years ago it first became the subject of discussion?

A. Yes; the discussion was to reach uniformity.

Q. How, to reach uniformity?

A. Yes.

Q. The various features of this form of construction were considered in the discussion?

A. Yes; that as well as others.

Q. After a full discussion among mechanics it was decided to abolish this old style of constructing cars?

A. Yes, sir.

Q. Wasn't that one of the considerations that led to the abolition of that old-fashioned car, the fact that it was a cumbersome, unwieldy, and dangerous thing to have on the road?

A. That is one of the considerations.

Q. Wasn't it the general voice of the mechanics of this country, so far as you know, in the discussion of that thing, that that kind of coupling ought to be damned and abolished?

A. I never had my attention called to it in that way. I must say that all the cars constructed years ago you see no cars built of that description now. There is a uniformity of length and height
185 and the general construction of the cars. There is but one car built now.

Q. That is the same as it is about the gauge of the roads?

A. Yes, sir.

Q. Isn't it considered to be a dangerous thing to be used in the service, and wasn't that considered?

A. I think it was.

Q. Isn't it a fact, to your knowledge, that since the cessation of the manufacture of that kind of thing that these old cars are gradually going out of use and are set aside as fast as they are worn out?

A. Yes; it is just as I said before; that part was done away with the same as the length of the cars has been done away with; the general construction of those cars is done away with. We have a

great many old 28-foot cars that were used and we use — as long as they are serviceable, but in our building we never build a 28-foot car.

Q. The result of that operation will be to gradually diminish the number of these old cars that come out West here?

A. I suppose so.

Q. And then in proportion as they get worn out they will cease to appear among our railroads?

A. The master car-builders' rules do not prohibit them from use, but they do not recommend them.

Q. Do you know this New Jersey Central road?

A. No, sir; but I think it is an eastern road.

Q. And a small number of cars, comparatively?

A. I never looked to see what the number of cars was. There is a record of all the roads in the master car-builders' book. It gives the number of miles of road and it is official.

186 Q. Have you one of those books?

A. Yes, sir; but I have not noticed about the New Jersey Central.

Q. Have you had any of these cars come into your shop to be repaired and overhauled?

A. Yes, sir; we have them very often in the shop for repair.

Q. What is the usual life of the freight car?

A. Well, I could not say what the life of the car is. I think it is about ten years.

Q. And you would say that it has been three or four years since the manufacture of this kind of cars has practically ceased?

A. I wouldn't say positively, but I believe that is about the time; those roads using that draw-bar are not near neighbors to me and I couldn't say what repairs they put on them.

Q. The rule in regard to the Lehigh Valley and the Philadelphia and Reading is of course the same as regards the New Jersey Central about the manufacture of these cars; it is all over, I understand.

A. I think so.

Q. You have had how long experience in the building of cars?

A. About 25 or 30 years.

Q. What would you say to this jury as — this being an ordinary or reasonably safe apparatus to put on a freight car that employés are required to couple and uncouple in the ordinary way of doing the work?

A. I think it is rather a dangerous coupling.

The COURT:

Q. How?

187 A. I think it is rather a dangerous construction.

Mr. FORD:

Q. You wouldn't recommend it?

A. No, sir; not on a road that I was on, if my judgment was asked for.

Re-examination:

Q. You don't know whether any of these cars are being manufactured by the Philadelphia and Reading?

A. Repairs are being kept up on them, that is all.

Q. But you think none of them are being manufactured by that company?

A. No, sir; I don't think they are.

Testimony of John Boyer.

Defendant, further to maintain the issues on its part, called as a witness JOHN BOYER, who, first being duly sworn, testified as follows:

Direct examination by Mr. SMITH:

Q. What is your business?

A. Foreman of freight construction and repairs for the Wabash, St. Louis and Pacific railway.

Q. Did you examine the two cars by which Adam Kohn was injured?

A. Yes, sir; as they were pointed out to me.

Q. What were they?

A. One was a Central Railroad of New Jersey, and the other was an M. D. T. car, which means Merchants' Despatch Transportation car.

Q. I want to ask you now whether the draw-heads of these two cars were or were not nearly on a level.

A. They were on a level when I saw them. They were
188 coupled together when I saw them with a straight link.

Q. How long after the accident was it when you saw them?

A. About two hours, perhaps.

Q. Were they still standing in the yard?

A. Yes, sir.

The COURT:

Q. On a level when coupled together?

A. Yes, sir.

Q. Would that show that they were on a level when not coupled?

A. I couldn't say that.

Q. Couldn't one be five or six inches higher than the other and appear to be level when coupled?

A. Not quite that much. There might be two or three inches difference and in coupling them together it might bring them together, but in a difference of three or four inches it would show the pitch.

Q. Would it bring the draw-bars on the same height?

A. No; it would leave one a little lower than the other.

Q. If they were coupled together they would be that way?

A. Yes, sir.

Mr. SMITH:

Q. When you saw them coupled together were they on a level?
A. Yes, sir.

The COURT:

Q. How do you account for that if they were not on a level when uncoupled?
A. I don't know. I didn't see them uncoupled.

189 Mr. SMITH:

Q. Could you tell from that whether they were of the same height when they were not coupled?
A. I say there might be a difference of two or three inches, but the difference of three or four inches would put them on a pitch.
Q. Wouldn't one inch put them on a pitch?
A. No, sir; there is always a little play in the draw-bar and the link would bring them on a level. There is usually a little play in the place, up and down—in the draw-bar—and there might be a difference in the cars when uncoupled of two or three inches in the height of these draw-bar heads, but when the link goes in it would bring them in on a level, but if there was a difference of four inches it would bring them in on a pitch like that (illustrates with the models).

Cross-examination by Mr. FORD:

Q. You are a mechanic?
A. Yes, sir.
Q. You saw those draw-bars after they were coupled, did you?
A. Yes, sir.
Q. Is it your judgment, as stated here by Mr. ——, that the mouth of that draw-bar in the M. D. car was from eight to ten inches, up and down?
A. Yes, sir; that is a large opening.
Q. Will you answer that if the link was on the bottom of an opening that was eight or ten inches, up and down, could it be coupled — a Jersey Central draw-bar five inches higher than that link and yet when they came together the link slope up without being on a level?
190 A. That would depend on where the link stood. I didn't see them uncoupled.
Q. If there is a slope of five inches—Mr. —— said there was ten inches up and down—say your link is coupled onto the draw-bar at that angle, wouldn't the link slope up here?
A. I admit that if the link was resting on the botton of the opening it might rise that much, but the link don't lie on the bottom. There is a key that goes through your link that holds it in the draw-bar.
Q. When it is not coupled don't that link fall down to the bottom of the mouth of the draw-bar?
A. Not in the Ames draw-bar. There is a key that goes through

the link and rests about in the center and holds it a little above, half way up.

Q. Then it don't have the play of ten inches?

A. It will drop, but the link stands above the center of the opening.

Q. What was on the level when you saw it?

A. The link.

Q. That is all you observed as being on a level, was it not?

A. Yes, sir; I couldn't say that the draw-bars were exactly on the level.

The COURT:

Q. Did you notice how that was?

A. I noticed—my attention was called to it—that is, the same as the cars, to see the construction and the look of it.

Q. Did you notice whether the draw-heads were on a level?

A. I didn't. I couldn't tell you as to whether the draw-
191 heads were exactly on the level or not, but the link as it stood in the mouth of the draw-bars stood on the level.

Mr. FORD:

Q. If the link rested half way up the height of the mouth of the draw-bar on a pin and the end of it was raised five inches and coupled into another draw-bar, when the train straightened up and the coupling was brought on a level was there anything to prevent that link slipping up and being on a level, although there was five inches difference?

A. It couldn't unless the other draw-bar was different. It was an iron draw-bar not to exceed two and a half inches high.

Q. Would that prevent the link of the M. D. car rising up?

A. That has but little to rise, because that is above the center.

Q. How much play is there in the mouth of that draw-bar?

A. Eight inches, I would say. I think there is not more than two inches above the center of the link.

Q. Is it pretty near the top of the mouth of the draw-bar?

A. Yes, sir; I think that is where it is, and the purpose of that large opening is for dropping.

Q. Then you would not say that the link rests six or seven inches from the bottom of the draw-bar?

A. The top of the link is probably six inches from the bottom of the draw-bar.

Q. How wide is that entire opening of the draw-bar?

A. Probably eight inches or perhaps more; in the M. D. it may be ten.

Q. In the car that stood there ain't it more?

192 A. It might be.

Q. If it was ten inches it would leave four inches to slope up?

A. My testimony is that from the top of the link to the top of the opening of the draw-bar is perhaps no more than two inches.

Q. Where were these cars?

A. In the Wabash yard, just opposite the shop, near the foot bridge.

Q. What means had you of knowing that those were the cars that hurt Kohn?

A. I have no means of knowing only as they were pointed out.

Q. Who pointed them out to you?

A. The yardmen—I think the switchman in charge of the pony.

Q. What is his name?

A. I don't know.

Q. Is he here to-day?

A. I think not.

Q. Then you don't know that the cars that you have been testifying about were the cars that hurt Kohn?

A. Only what knowledge I derived from others; I didn't see Kohn hurt. I got to the cars about seven o'clock, and my attention was called to them.

Re-examination:

Q. What day did you examine these cars? Was it the day Kohn was hurt or later?

A. The same day.

Q. What time of the day did you examine them?

A. About half past seven in the morning, railroad time.

193 Q. Where were these cars?

A. Just opposite the car shops.

Q. Which car was next to the engine?

A. The Central Railroad of New Jersey.

Q. Which car was next to that?

A. This M. D. T. car.

Mr. FORD:

Q. Did the engine stand there from four to seven?

A. No, sir; I didn't see any engine.

Mr. SMITH:

Q. These two cars were at the same end of the train?

A. Yes, sir.

Q. At which end?

A. The west end.

Q. What is your best recollection as to whether the draw-heads of these two cars were on a level or not?

A. The tops of the draw-heads were nearly on a level.

The COURT:

Q. Wouldn't the bottoms be, too?

A. No, sir; the draw-head in the New Jersey Central car is narrower. In the M. D. car there is a large draw-bar; the Ames draw-bar is perhaps twelve inches from out to out, up and down; it extends lower underneath.

Q. But the place where the links come together, the tops of them, were about on a level?

A. Yes; very nearly.

Q. The draw-bar might be up or down?

A. It cant't be down.

Q. It being on a level with the Jersey car, the link would be on a level?

194 A. Yes; the two cars coming together would bring it on a level.

Q. Was your attention called in any way as to whether these two cars were of the same height? Did anybody claim that they were not?

A. Not at that time.

Q. You didn't examine it for any special purpose. Was your examination because this man was hurt?

A. They told me that there was a man hurt.

Q. You went and examined it after you heard that?

A. Yes, sir.

And thereupon the defendant rested.

Plaintiff's Testimony in Rebuttal.

Testimony of Christ. Kohn in rebuttal.

Plaintiff, further to maintain the issues on his part and by way of rebuttal, called as a witness CHRIST. KOHN, who, having been previously sworn, testified as follows:

Direct examination by Mr. FORD:

Q. I think you said you were acquainted somewhat with these couplings in the M. D. cars?

A. Yes, sir.

Q. What is called the bull-tongue?

A. Yes, sir.

Q. How well acquainted were you with this bull-tongue coupling, where this link lies when it is at rest in this bull-tongue?

A. It is about two or three inches from the bottom; not from the top.

195 Q. How much opening is there up and down in the mouth of those draw-bars?

A. I should think there is—well, there might be five inches or maybe six inches.

And thereupon both plaintiff and defendant rested, and no other or further testimony was submitted by either party to said action, and the above and foregoing is all the testimony heard on said trial.

And thereupon the court instructed the jury as follows:

Charge of the Court to Jury.

Charge of the court.

Gentlemen, in order to save all questions that legally arise in this case, I have suggested to counsel that the jury may regard the plaintiff's right to recover damages in this case as being settled, and we simply submit to your judgment and take your opinion as to how much the plaintiff is entitled to recover by reason of the damages for the injury of which he complains.

The rule on that subject, gentlemen, is that the plaintiff is entitled to a fair and reasonable compensation for all the damages that he has sustained by reason of the injury of which he complains in the action. There are several elements to be taken into account by the jury in assessing damages in a case like this. There is the personal injury, in which more or less pain and suffering has been sustained and experienced by the plaintiff, and that is an element that you have a right to take into account in assessing him damages in an action of this kind. In the next place, the cost of nursing, doctor's bills, if shown to have been incurred, are also another element that you have a right to take into consideration; then, in
196 the next place, the loss of services, the opportunity of earning wages during the time that he was disabled by reason of the injury inflicted by the amputation of the arm, as stated by the doctor when a witness on the stand. Then, lastly, you are to estimate, if there is a permanent injury, the extent of that injury and make a fair and reasonable compensation for the injury that may result from the disability—an entire total disability—by reason of the loss of one of his arms, for, of course, you understand that the disability can never be removed except by an artificial arm, taking into account the age, condition of life, and the capacity of this plaintiff to earn wages himself and his capacity and ability to perform labor and contrast that with his condition now, and that would be an element to enter into your consideration in estimating such fair damages as he ought to be entitled to for the injury.

In this case it would not be your duty to inflict any damages by way of punishment upon this railroad company. It is simply an enquiry as to the amount of damages that the plaintiff has sustained by reason of this injury and on account of it, and that is a matter entirely within your consideration, and you have a right to look into all the circumstances and surroundings and make such an assessment as you would think would be right and proper under the circumstances and as will compensate him for the injury he has sustained. Taking into consideration these elements, it will be your duty to give the court your opinion as to how much he is entitled to recover in the form of a verdict for damages; and all these
197 other questions will be discussed hereafter on a motion for a new trial, and I will not trouble the jury with any of those troublesome questions in the disposition of the case.

A JUROR: I would like to see the stump of the arm and determine its disability.

The COURT: The doctor said it was cut off just below the elbow. I have no objections to your seeing the arm; it is a matter of evidence. We do not wish to do that unless it is consented to.

Mr. SMITH: I will not make any objection to it; let it be shown. I don't want to be technical about it. (Thereupon the plaintiff exhibited his arm to the jury as suggested.)

And thereupon the jury retired and in due time returned into court with their verdict, which was in favor of the plaintiff and against the defendant for the sum of ten thousand dollars.

The foregoing is all the testimony submitted by the parties on both sides, the defendant having filed his motion for a new trial, which was granted by the court and the verdict set aside and petition dismissed, to which the complainant, Adam Kohn, excepts, and presents this his bill of exceptions, which, being examined by the court, is found correct and is signed, sealed, and ordered to be made part of the record in this case this 4th day of February, 1889, and at the December term, 1888, of said court.

M. WELKER. [SEAL.]

198 Know all men by these presents that we, J. D. Ford and J. K. Hamilton, as sureties, and Adam Kohn, as principal, are held and firmly bound unto John McNulta, as receiver of the Wabash, St. Louis & Pacific Railway Company, in the sum of two hundred and fifty dollars; to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 13th day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas the above-bounden Adam Kohn, as intervening petitioner, has appealed to the Supreme Court of the United States from a decree of the circuit court of the United States for the northern district of Ohio, western division, bearing date the 2nd day of February, A. D. 1889, in a cause wherein the said Adam Kohn, as intervening petitioner, *is* plaintiff, and the said John McNulta, as such receiver, was respondent: Now, therefore, the condition of this obligation is such that if the above-named appellant, Adam Kohn, shall prosecute said appeal with effect and pay all such costs as shall be awarded against him as such appellant therein, then this obligation to be void; otherwise to remain in full force and effect.

ADAM KOHN. [SEAL.]
J. D. FORD. [SEAL.]
J. K. HAMILTON. [SEAL.]
——— ———. [SEAL.]

Sealed and delivered in presence of—

M. G. BLOCK.
JAMES W. CALDWELL.

(Endorsed:) No. 540. In the circuit court of the United States for the northern district of Ohio. Thomas B. Atkins *et al. vs.* The Wabash, St. Louis & Pacific R'y Co. *et al.* Appeal bond. *In re* intervening petition of Adam Kohn. Approved and filed Feb'y 16th, 1889. A. J. Ricks, clerk.

199 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

NORTHERN DISTRICT OF OHIO, *ss:*

I, Martin W. Sanders, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of the proceedings had in said court in the above case as fully hereinbefore entitled as the same appears from the files and records of said court now remaining in my custody.

In testimony whereof I have hereunto signed my name and affixed the seal of the said court, at Toledo, in said district, on this fourteeenth day of September, A. D. 1889, and of the 114th year of the Independence of the United States of America.

Seal of the Circuit Court, North'n Dist. of Ohio.

MARTIN W. SANDERS, *Clerk*,
By HALLIE W. BROWN,
Deputy Clerk.

Endorsed on cover: Case No. 13,658. N. Ohio C. C. U. S. No. 105. Adam Kohn, appellant, *vs.* John McNulta, receiver of the Wabash, St. Louis & Pacific Railway Company. Filed September 26, 1889.

147 U.S. 23 F

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1892.

TERM NO. 105.

ADAM KOHN, APPELLANT,

vs.

JOHN McNULTY, RECEIVER OF THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF OF J. K. HAMILTON, ATTORNEY FOR APPELLANT.

SAMSEY & FISHER, EVENING NEWS JOB ROOMS.

ADAM KOHN, APPELLANT,

vs.

JOHN McNULTY, RECEIVER OF THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY.

STATEMENT OF THE CASE.

This case comes into this Court on appeal from the Circuit Court of the United States for the Northern District of Ohio, Western Division.

Adam Kohn, the intervening petitioner, was a servant of the Receiver of the Wabash Railroad, when that road was being run by a Receiver appointed by that Court, and while so employed, in coupling cars, lost his right arm by its being caught by what is claimed were unusually dangerous deadwoods. He came into the main case by intervening petition, on which issues of fact were raised, by answer and reply. On his application, the Circuit Court allowed these issues to be submitted to a jury. The testimony being all taken, at the close of the trial, the District Judge who tried the case, instead of submitting all the issues to the jury, submitted only the single question of the amount of petitioner's damage. The jury fixed that at $10,000. A motion was made by the Receiver, in the Chancery Court, to set aside the verdict, which was granted, and the petition dismissed and his claim for damages disallowed. (Record page 29). An appeal was allowed by the Court, and a bill of exceptions taken, embodying all the testimony in the case, which, with the transcript of all the proceedings, makes up the record in this case. The Chancellor did not at any time frame, or assign, any specified issues of fact to be submitted to the jury, on the law side of the court, nor had any evidence whatever been offered at the time of allowing a jury, from which such issues could be framed,

and from the time the petition was ordered to be submitted to a jury to the last order made in the case the distinction between the equity and law sides of the court seems to have been lost sight of by the Judge (Welker) in charge of the proceedings, and the record of the equity and law sides of the court in the case is a confusion of both, with no formal certificate from the law side to the equity side of the court as to the proceedings in the law court, such as the strict rules of chancery practice would seem to require, and yet the same objects of such certficate is accomplished in perhaps a somewhat irregular way.

The bill of exceptions is incorporated in and made part of the record in the case, and bears the following certificate, over the signature of the Judge who presided at the trial before the jury page (108):

"And thereupon both plaintiff and defendant rested and no other or further testimony was submitted by either party to said action, and the above and foregoing is all the testimony heard on said trial."

And on page 110: "The foregoing is all the testimony submitted by the parties on both sides; the defendant having filed his motion for a new trial, which was granted by the Court, and the verdict set aside and petition dismissed, to which the complainant, Adam Kohn, excepts and presents this, his bill of exceptions, which, being examined by the Court, is found correct and is signed, sealed and ordered to be made part of the record in this case, this 4th day of Februrary, 1889, and at the December term, 1888, of said Court.

M. WELKER. [SEAL]"

As this certificate shows clearly that the bill of exceptions contains all the evidence offered on the trial, and the last four of the five grounds of the motion for a new trial, as appears on page 29 of the record, and which was heard and granted by the chancery side of the court, relate exclusively to the evidence, and the first ground, to the sufficiency of the petition, it cannot be urged, with any show of candor, that the Chancellor, when he acted on said motion, did not have before him the same case that this court now has before it, in this record.

The two cases must be identical. The Chancellor would not, and could not, have acted on said motion, without having some of the evidence before him, and if he had some, he had it all, for it is all contained in the bill of exceptions taken at the time to his action.

The appellant makes no complaint of the verdict, and he took no exceptions, during the trial before the jury, of which he now complains to this court, and there is no act of the law side of the court, against which he seeks any relief in this court. It is only the questions presented by the motion for a new trial and the dismissal of the petition,

which are final orders and decrees, which he asks this court to remedy on this appeal.

The case presented in the record is not the first case where the court below has failed to keep distinct and separate the chancery and law sides of the court, in the trial of such issues in a court of chancery, and has failed to formally certify matters from one to the other. The Court of Appeals of Virginia, in the case of Watkins vs. Carlton, (10 Leigh, 572), which is considered with approval by this Court in the case of Watt vs. Starke (101 U. S 255) says on this subject: "The exceptions, therefore, ought to have been so certified, and doubtless they were so, since a motion was expressly made and entertained for a new trial of the issues, on the ground of misdirection set forth in these exceptions. In this case, indeed, unless we look to the law record, the whole proceeding appears irregular: The bill was filed in the Court of Chancery of Richmond, and the issue was directed by it to be tried in the Circuit Court of King and Queen. There it depended for several years, when, all at once, the case makes its appearance in Essex, without any order appearing by which it was sent thither, unless we look into the law record. *There*, indeed, we see the order, sending it to Essex for the trial of the issue; but in the chancery record no warrant for the action of that court appears. If the law record were rejected, the Court of Essex would be found trying an issue without authority, and pronouncing a final decree upon it without jurisdiction. I do not, however, rest upon this necessity which the appellee is under to admit the law record, I go upon a broad ground that upon a trial of an issue out of chancery to enlighten the conscience of the Chancellor, the whole of the proceedings at the trial, so far as they are spread upon the record, properly constitute a part of the certificate of the verdict, and, of course, become a part of the chancery record." And looking into the record in that case, in its imperfect condition, governed by these rules, the Court of Appeals sent the case back to be tried again in the lower court. On page 574 they say:

"The only proper question in the cause is whether there should be a new trial of the issues. I think there ought to be, both because they are not in all things responded to by the verdict, and because they were found under a misdirection of the Judge."

In the case of Johnson vs. Harman (94 U. S., page 378) this Court says:

"Where exceptions are taken on the trial of an issue out of chancery and *made part of the record*, the certificate to the verdict by the court of law, is a certificate to the whole record, and the exceptions, though not expressly certified, become a *part of the chancery record*."

In the case of Brockenbrough vs. Spindler (17 Grattan, page 29) the Court of Appeals of Virginia, in alluding to a statute that authorizes a plaintiff to have an opportunity of making his defense in an issue to be tried at its bar by a jury, says:

"The statute seems to contemplate that all the proceedings, including the trial of the issue, are to be had in the chancery cause, instead of having the issue tried on the law side of the court, and the verdict and other proceedings on the trial, certified from that to the chancery side of the court, according to the formality observed in the case of an ordinary issue out of chancery. *I can see no well founded objection to the former course, and it seems to be recommended by its simplicity and directness.*"

Further on, in this opinion, the Court says: "All that was done was done in the same court," and they look into the whole record, and dispose of the case, and send it back for a new trial So, in this case, all was done in the same court, and all that was done is spread upon the record, and appears before the court. We have said this much about the record in this case, rather in anticipation of what may be claimed by appellee's counsel as to irregularities in the proceedings in the court below, and we shall file but this one Brief.

ISSUES RAISED ON THE PLEADINGS.

Among the issues of fact raised by the petition, answer and reply, were:

First—That it was the duty of the Receiver to furnish appellant suitable and safe appliances and means for coupling cars.

Second—That the freight cars generally in use by the Receiver during appellant's limited service on his road were without deadwoods.

Third—That appellant had a limited knowledge and experience in coupling cars generally.

Fourth—Before entering the service of the Receiver he was wholly without any experience in the business of railroading.

Fifth—That the Receiver was informed and well knew all these facts at the time appellant was employed and set to work by him.

Sixth—That all the knowledge or experience appellant had in the business was acquired by him between the 29th day of March and the 11th day of July, 1889, while in defendant's service.

Seventh—That during that time appellant had little or no knowledge of the danger of coupling cars constructed with deadwoods.

Eighth—That the Receiver, well knowing these facts, wholly failed and neglected to inform appellant of such danger, or instruct him in any way to look out for or avoid such danger.

Ninth—That the cars appellant had been accustomed to use were supplied with draw-bars of about the same height which were much easier coupled and less dangerous than when there was a difference in the height.

Tenth—That the cars appellant was required to couple were constructed with large deadwoods on each side of the draw-bar, with which appellant was unfamiliar and the danger and character of which was unknown to him.

Eleventh—That one of the draw-bars on said cars was four inches higher than the other, which increased the hazzard of coupling, which was well known to the Receiver.

Twelfth—That the Receiver was guilty of negligence in receiving such cars into his train and in ordering appellant, with his knowledge of the want of experience in such matters, to couple the same.

Thirteenth—That to couple such cars required more time than the cars appellant had been accustomed to couple, and while he was using all care on his part, and wholly wi hout his fault, said deadwoods and cars came suddenly together and caught his arm.

Fourteenth—That he sustained said injury wholly without fault of his own and in consequence of the negligence of the Receiver in the matter therein specified.

Fifteenth—Raised by answer and reply: That appellant had ample opportunity to learn, and did learn and knew the danger attending the coupling of cars with deadwoods, and he was in fact informed of the same.

Sixteenth—That a large portion of the cars in use on the Receiver's road were provided with such deadwoods as those by which appellant was injured

Seventeenth—The negligence and want of care on the part of appellant, and that the injury was wholly caused thereby.

Of these seventeen assignments of facts not one was submitted to the jury, and hence have never been submitted to the arbitration or decision of any tribunal, unless it can be said they were submitted to the District Judge on a motion for a new trial and to set aside the verdict and dismiss the petition.

ALLEGATIONS OF PETITION ARE MATERIAL.

The only ground then upon which the proceedings of the court below is so uncerimoniously turning this poor and crippled boy out of court can be sustained is that if all the facts are true as stated in the petition, the appellant would have no right to recover In actions founded upon negligence, the fact of experience, knowledge, opportunities for observing and acquiring knowledge, age, capacity, powers of discernment, familiarity, or the want of it, with any trade or calling, contributary negligence or the absence of it, the dangerous or secure condition of the implements of machinery used, so far as they may affect the injured party, have been generally regarded by the bench and bar as material and important. No demurrer was filed to this petition and numerous witnesses were called by the defendant in his effort to maintain these issues on his part as raised by his answer.

RULES OF LAW AND AUTHORITIES APPLICABLE TO THE CASE.

When the Court can and can not rest a case from the jury and direct a non-suit, especially under the federal practice, is a question with which, no doubt, this Court is more familiar than counsel and we shall not discuss it. The rule laid down in "Moaks Underhill on Torts, page 317, is doubtless correct, which is, "whether there is *reasonable* evidence to be left to the jury of negligence occasioning the injury complained of is a question for the judge. It is for the jury to say whether and how far the evidence is to be believed." To this should be added what appears in another rule on page 318 of the same work:

"If the facts depend upon the credibility of witnesses or upon *inferences to be drawn from the circumstances proved* then it is the right of the plaintiff to have the question submitted to the jury."

See authorities there cited.

What duties did the defendant owe to the plaintiff? It is well defined in the case of R. R. Co. vs. Lavalley, 26 O. S. 221, as follows:

"It is the duty of a railroad company to make such regulations or provisions for the safety of its employes as will afford them reasonable protection against the danger incident to the performance of their respective duties."

Another rule found in "Moaks Underhill on Torts," page 57 (4):

"If there exist facts known to the employer, and unknown to the employe, increasing the risk of such employment beyond its ordinary

hazzards, the employer is bound to disclose such facts to his employe, otherwise he will be liable as for negligence in case of injury resulting to the latter resulting from such unusual risks."

Smith vs. St. Louis, etc. R. R. Co , 69 Mo , 32.
Porter vs. H. & St. J. R. R. Co., 71 Mo. 66.
Coombs vs. New Bedford & Co., 102 Mass. 572.
Dorsey vs. Phillips & Colby Con. Co., 42 Wis. 583.
Lawless vs. Conn. River R. R. Co., 136 Mass. 1.
Forsyth vs. Hooper, 11 Allen 419.
Cayzer vs. Taylor, 10 Gray 274
Clark vs. Holmes, 7 H. & N. 937.
Baxter vs. Roberts, 44 Cal. 187.
Williams vs. Clough, 3 Hurt & N. 258.
Hill vs. Gust, 55 Ind. 45.
O'Connor vs. Adams, 120 Mass. 427.
Walsh vs. Peete Valve Co., 110 Mass. 23.
Keegan vs. Cavanaugh, 62 Mo. 230.
Hough vs. Railway Co., 100 U. S., 213.
Railroad Co. vs. Mares, 123 U. S. 710.

The foregoing cases not only settle the rule as to the general duty of the master and employer, but they establish another rule of equal importance in this class of cases, and that is, the risks assumed by the employe in the contract of service, and the measure of compensation.

This rule, deducible from the foregoing authorities and many others that may be cited, is very clearly stated in the case of Smith vs. Powell & Co. by the Superior Court of Cincinnati 23, bulletin page 436, and, substituting the name of Kohn for Smith, would be in the following language—Smith in that case being the employe who was injured:

"The jury is instructed that the rule that Jacob Smith assumed the risks of his employment, means that Jacob Smith only assumed the necessary, ordinary, inseparable, and inherent risks incident to the nature of his employment, and which are incident to all such employment.

"Wharton on negligence, sec. 205. (2d ed.)
"Wood, M. & S., sec. 326, page 672. (2d ed.)
"Wood, M & S., sec. 326, page 672, note 1. (2d ed.)

"As to all such risks and dangers as were not necessarily, or ordinarily, inseparably, and inherently, incident to the nature of his employment, and which defendant knew, or ought to have known, it was the duty of defendant to have *notified and warned* Jacob Smith as to their nature and necessary consequences, and if said Jacob Smith did not reasonably know their nature and necessary consequences from any other source, and with ordinary prudence could not have known, and

defendant or its agents did not notify and warn Jacob Smith as to their nature and necessary consequences, Jacob Smith cannot be charged with the assumption of such risks and dangers.

" Wharton on Negligence, sec 206. (2d ed.)
" McGowen vs. Mining & Smelting Co., 3 McCrary 93
" Paulmer vs. R. R. Co., 34 N. J. (Law) 151."

That eminent jurist Judge Cooley, who while on the supreme bench of his own state gained such an unenviable reputation for generally standing on the side of railroad corporations, in the uneven struggles between them and their maimed and crippled employes in the case of R. R. Co. vs. Gildersleeve 33 Mich 133, penned this rule in the following pointed and significant language in the syllabus of that case:

" A servant has the right to repose confidence in the prudence and caution of his own employer and to rely upon him not putting him in charge of implements which from improper construction or other causes are so dangerous that a prudent man would not make use of them "

On the question of effect of the employes' knowledge of the danger or unfitness of things, the Supreme Court of the United States has clearly laid down the rule in the late case of R. R. Co. vs. Mares Supra in answer to the following request to charge the jury in the court below, page 717:

" If the plaintiff knew or had the opportunity of knowing before his fall from the car in question, that Bassett was an unfit or unsafe man to run the engine in question, in that case it was the plaintiff's duty to refuse to work with him any longer, and his failure to do so would prevent him from recovering in this suit."

Again:

" The evidence adduced on behalf of the plaintiff tended to show that Bassett was guilty of negligence in running his engine during the same night on which the plaintiff was hurt previous to the accident and while the plaintiff was working with him. If the jury believe such to have been the fact it must find for the defendant."

In reviewing this action of the Court, Justice Mathews, speaking for the Court, on page 720 says:

" We think the Court was clearly right in refusing to give the peremptory instructions asked for by the defendant," etc.

We ask attention to the balance of this opinion found on pages 720 and 721. Now what are the facts of the case at bar as shown by the preponderance of the evidence.

THE PROOFS.

Adam Kohn was at the time of the accident a young man between 24 and 25 years of age; all the railroading he had ever done and the only opportunities he had of observing or knowing the business, was

two months and thirteen days' service, and all the time in the service of the same employer on the same road. At the time he was employed, his employer was informed and knew perfectly well that he had never done any railroad work and had no knowledge or experience of it. Yet this vast corporation with this immense business put this inexperienced man to work, knowing his inexperience and knowing the variety of its cars, its coupling and gearing, without one word of instructions, without a single suggestion as to the course he should pursue, and without placing in his hands a single time card with rules and instructions, such as is usually and ought always to be done, and without placing in his hands for his guidance any book of rules or a single word, either written or printed, to furnish him any guide as to his service. It may be said it is impossible for these great corporations to tell every man they employ how to do their work; but who that is at all familiar with the way these vast corporations manage their business, does not know that printed rules and books of rules are, and ought to be, prepared and placed in the hands of every employe, when he is first employed, calling his attention to the dangerous things to look out for and guiding him as to how he shall do his work. Yet this Receiver never took this precaution. There is not one word in the whole record that pretends to claim that any such thing was done, though one witness sa[illegible] he thinks they gave him books of rules *after Kohn was hurt.*

Testimony of Samuel Grasse, 99.

This case should not be confounded with one of a mere variance in the kind of deadwoods or draw-bars that will appear on the cars of the various roads, and in cases of which entire uniformity may not be claimed or expected. But Kohn had worked for this Receiver and on the Wabash road only, on no other roads. The deadwoods of the cars on the Wabash and with which he was familiar were of peculiar construction, consisting of a small block directly over the draw-bar and safe, as all agree.

This was the object lesson from which Kohn gained what knowledge he had of railroading, and the deadwoods on the roads with few exceptions running into Toledo, while not exactly like those on the Wabash, were similar.

KOHN'S EXPERIENCE AND KNOWLEDGE.

The following testimony taken from the record shows the total of Kohn's experience with cars with the large deadwood, from his testimony, page 36:

Q. Had you ever seen one of these New Jersey Central cars before?

A. Not that I remember of.

Q. What did you know about other cars with deadwoods on them?

A. None at all.

Q. Had you coupled some of them?

A. I may have coupled one or two and may have coupled five.

Q. What do you say to the jury as to whether you ever undertook to couple one of these big things before?

A. No, sir, not that I can remember of.

And on page 46:

Q Didn't you ever see a Central Railroad of New Jersey car?

A. Not before this one that I know of.

Page 47:

Q. How many of those thirty-five or forty cars in one of those trains would be Wabash cars and how many cars that came from other lines?

A. Most all would be Wabash cars.

Q. How many came from other lines in a train of forty cars?

A. Four or five.

Page 55:

Q During, say the two and a half months that Adam Kohn worked there, say as to whether you had any of these New Jersey Central cars in your service during that time?

A I remember of seeing one; I never remember of seeing very many of them.

Q. Do you mean this one that hurt him?

A. Yes. Since I worked there I have never seen very many of them

Page 56:

Q. Did you ever see any of those New Jersey Central cars, I mean while he was working there?

A. I don't know as I did.

Q. I want to get at how generally these big bumpers were in use on that road while Adam Kohn was there; you say you do not remember of seeing any of the New Jersey Central's?

A. I don't remember of seeing any there.

Page 57:

Q How many of these did you know of—those cars in your ser-

vice with the long fourteen-inch deadwoods on, while Adam Kohn was there helping you?

A. I didn't see any; I don't know whether there was any there when he was there or not.

TESTIMONY OF JAMES CALDWELL (*Page* 64.)

Q. Do any of the regular cars of those roads have these big bumpers on?

A. No, sir, they do not.

The Court—Q. That is the Wabash?

A. No, the Wabash, the Lake Shore nor the D. & M.; that is what you want to get at, I suppose.

Q. I want to know what you know about that The spring and summer of 1887—the summer that Kohn got hurt there—while you were at work for the Wabash and switching those cars back and forth, were there many of those cars came in there?

A. They didn't to my knowledge.

Q. They didn't?

A. No, sir.

TESTIMONY OF CHRISTOPHER KOHN (*Page* 69.)

Q. During that spring and summer how many cars coming over the Wabash had these long deadwoods?

A. I never saw many of them; I never had occasion to couple many of them.

Q. How often did these cars with this kind of coupling apparatus come through the Wabash service while Adam was there—the two months and thirteen days?

A. In the two years I was there I don't believe I made more than ten couplings of them.

TESTIMONY OF HENRY HOLLAND (*Page* 73.)

Q. How was it about these cars being in use very generally there with the big long deadwoods?

A. Well, they didn't use but a very few of them; I worked five months and I didn't come aross one where I had to couple two of them together.

Page 74:

Q. What proportion of the cars would you see while you were there on the Wabash that had those long deadwoods?

A. Well, there were not many; I don't believe you would find over five or six of them there in a week when I was there.

Page 76:

Q. In your experience, what proportion of the cars that came through the Wabash yards while you were there in May and June, 1887, had buffers on of about this kind?

A. Not many; once in a while they would run across one.

All of these witnesses worked on the Wabash all the time that Kohn did, and most of them many months and some of them years before.

So we say that this kind of a car was not one in common or even frequent use in railroad business in the section of country in which Kohn engaged in the service, and with reference to which it cannot be fairly said he may be presumed to have contracted.

That it was a car of an unusually dangerous construction, difficult and dangerous to couple, is admitted by defendant. That it belonged to a small local road many hundred miles from Toledo is shown by the evidence, and was as unlike the ordinary car in general use in the section of the country where Kohn contracted for service as the Monitor, that in the early history of the civil war stole silently into Hampton roads with such devastation and destruction, was unlike the common war vessels of that time.

THE FATAL DEADWOODS.

It was provided with two large deadwoods, one on each side of the draw-bar and extending out nearly to the end of the draw-bar, and being from fourteen to seventeen inches long up and down, so that the head of the draw-bar was pretty effectually inclosed in these murderous heads of solid timber.

TESTIMONY OF JAMES CALDWELL (Page 65).

Q. How long was the bumper of the New Jersey Central?

A. Just about the same as the Lehigh Valley, with the exception that they came together closer up at the draw-bar.

Q How long are they up and down?

A. About fourteen inches up and down.

Q. From your experience on other roads where you have had these cars, what do you say about the difficulty or danger of coupling these big cars with these big deadwoods on them?

A. I say they are more dangerous than the common deadwoods.

Q. Why?

A. Because they are longer up and down and you have no chance to get your arm under them nor over them; the other draw-bars are just the same as—here is the draw-bar right over here and here is the deadwoods, and you can get your arm under them, or else you can get it over them.

Q. And not have any danger?

A. And not have any danger whatever.

Q. But with these things you can't do that?

A. No, sir; you have got to either get your arm under them and sit down on your knees and make the coupling, or else you have got to reach your arm away over here, more'n your arm will stand.

TESTIMONY OF CHRIST. KOHN (*Page* 70.)

Q How do you couple with the little deadwoods and where do you put your hand?

A. You have got to put your hand down under the deadwood.

Q. Or over them?

A. Yes, or over them.

Q. Why can't you put your hand down under there (the big deadwoods)?

A. You have got to lay down to it if you get to it; they come within eighteen inches, I should think, from the rail.

Q. From the rail?

A They are about sixteen inches long.

Q. Up and down?

A. Yes.

Q. Could they be connected with a stick?

A I suppose they could.

Q How would they do that?

Q Hold the stick in there, and leave it and smash it if you had two of them together.

Page 71:

Q. Where does your hand go with reference to these big bumpers?

A You have got to get down on your knees to do it.

Q. Then if the car rolls along you are on your knees?

A. Then you would be knocked down.

Q You say you have coupled them together about ten times in your experience; how did you do it?

A. I would stand back and take a club.

Page 72:

Q. Would your hand be hit?

A Yes, the higher you raise it up the worse it is; you have got to get down under and shove it up; you can't get hold to lift it up; a club or hook must be used to couple them.

TESTIMONY OF HENRY HOLLAND (Page 74.)

Q. What do you say to this jury as to the danger and difficulty of coupling these cars over and above the ordinary car?

A. They are not safe.

Q Why?

A. There is no way to get at them and make the coupling unless you have a big club and keep outside of the cars.

Q. How would you do it?

A. Take it and stick it in there, and if it mashes up it is all right; I wouldn't put my arms in there for nothing.

Page 75:

Q. How could you get under this to couple the big New Jersey Central car?

A. There is no way of getting to that at all; it is a dangerous coupling

Q. Is it a coupling generally in use by the Wabash, was it at the time Adam worked there?

A. No, it is not.

Q. You spoke about how you would have to couple tho e with a stick; how do you get at that information, suppose you know nothing about coupling?

A. I have watched it on some cars to see how they went together.

Q. You learned that from experience?

A. Yes, nobody told me nothing about them

Q. When you did couple them, how would you do it?

A. With a club, or I would take and set the link so it would make itself.

But the most dangerous and extraordinary character of these cars is shown by the testimony offered by the appellee by Samuel Grasse, yardmaster of the Wabash road and for seventeen years a railroad man, who states that on the road where these cars are used they are coupled from above, with a hook, and the cars have a projection on which the man can stand and work the hook. On page 92 he says:

A. Yes, sir; and you take two of that class of cars, and they, I think, are dangerous, very dangerous, unless they are coupled, as I understand they are coupled on roads using them generally.

Q. How is that?

A I understand they couple them with a hook from the top of the car.

Q. From above?

A. Yes, I understand that this extension on the front end of the car is placed there for the convenience of the men coupling the cars and that they use hooks to couple them with.

Now, conceding the rule of law to be that Kohn in entering the

service of the Receiver assumed the risks ordinarily arising from the difference in the heighth of draw-bars and the variation in style of deadwoods in general use on various roads, we claim the New Jersey Central car that was usually coupled on the road where it is in use with a hook from above, is so extraordinary in its dangerous features, as to be equal to a car from a foreign road that was improperly loaded with materials projecting over the front end in a way to endanger the lives or limbs of brakemen in coupling them, who did not know the dangerous condition.

THEY HAD BEEN GENERALLY CONDEMNED BY CAR BUILDERS.

As an evidence that they were extraordinary, we cite the Court to the fact that long before Kohn entered the railroad work they had been absolutely condemned by car builders and generally set aside and in disuse. They were not then a convenient structure in use, and no more entitled to be received into a train and required to be used by the men than an overloaded or otherwise dangerous car. These facts are clearly shown by the testimony of Howard, the general car builder of the Wabash, one of appellee's witnesses, who had been a railroad man twenty-five years, three years on the Wabash, and had general charge of their shops. Speaking of these New Jersey Central cars he says, on page 101:

Q. I will ask you whether the question of the utility of using these deadwoods upon the ends of railroad cars has been discussed among car builders and the master mechanics of railways sometimes?

A. Yes, sir, it is.

Q. Has it been much discussed?

A. To a considerable extent—yes, sir.

Q. Is it still being discussed—that question as to their propriety?

A. No, sir, it is not.

The Court—Q. Is it settled that they don't make any more that way?

A. No, sir, they are not building any more of that build?

Q. So that cars like those were built before two or three years ago?

A. Yes, sir; there is but one car built now—the master car, builder's car—which is nearly the same construction as ours.

Page 102:

Q. You have told us just what I wanted to know about these old cars, and that is that the practicability of building cars in this style, with these bumpers on there, or man-killers, has been discussed generally among the car builders of this country—has it?

A. Yes, sir.

Q. How long ago did that discussion take place?

A. That has been agitated for every year, say three or four years back.

Q. Three or four years ago it first became the subject of discussion?

A. Yes, the discussion was to reach uniformity.

Q. After a full discussion among mechanics it was decided to abolish this old style of constructing cars?

A. Yes, sir.

Q. Wasn't it the general voice of the mechanics of this country, so far as you know, in the discussion of that thing, that that kind of coupling ought to be damned and abolished?

A. I never had my attention called to it in that way; I must say that all the cars constructed years ago, you see no cars built of that description now; there is a uniformity of length and height and the general construction of the same; there is but one car built now

Page 103:

Q. What is the usual life of a freight car?

A. Well, I could not say what the life of the car is; I think it is about ten years.

Q. And you would say that it has been three or four years since the manufacture of this kind of cars has practically ceased?

A. I wouldn't say positively, but I believe that it is about the time; those roads using that draw-bar are not near neighbors to me and I couldn't say what repairs they put on them.

Q. You have had how long experience in the building of cars?

A. About twenty-five or thirty years.

Q. What would you say to this jury as to this being an ordinarily or reasonably safe apparatus to put on a freight car that employes are required to couple and uncouple in the ordinary way of doing the work?

A. I think it is rather a dangerous coupling.

The Court:

Q How?

A. I think it is rather a dangerous construction.

Q. Would you recommend it?

A. No, sir, not on a road that I was on, if my judgment was asked for.

But this brief need not be extended. The burdens of a bill of exceptions, transcript of record, cost of printing record and briefs which this poor one-armed man, almost wholly without means, has had to bear in order to bring this case into this, the highest tribunal of the nation have been grievous for him to bear. If the Court below or the attorney on either side have omitted formalities which should have been observed or committed blunders, we still bespeak for his case in this Court, which brushes aside technicalities when they stand in the way of justice and right, a careful consideration on its merits, and ask that it either be sent back to be tried in the right way, or that this Court enter judgment on the verdict of the jury, or make such other order as justice may require.

J. K HAMILTON,

Attorney for Appellant

147 U.S. 231

DEC 16 18
JAMES H. McKENN

Supreme Court of the United States.

OCTOBER TERM, 1892.

TERM No. 105.

ADAM KOHN,
APPELLANT,

vs.

JOHN McNULTA, RECEIVER OF THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OHIO.

STATEMENT AND BRIEF FOR APPELLEE.

WELLS H. BLODGETT,
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STATEMENT.

This was a proceeding in the Circuit Court, by intervention, against John McNulta, as receiver of the Wabash,

St. Louis & Pacific Railway. The following are the substantial facts shown by the record: —

Adam Kohn, the appellant, was employed as a switchman in the Wabash yard at Toledo, Ohio, and in attempting to couple a freight car belonging to the New Jersey Central Railway Company to one belonging to the Merchants' Dispatch, his arm was caught between the dead-woods, or bumpers, and so injured as to render amputation necessary below the elbow joint.

Neither of the cars were out of repair, but it was averred in the petition that they were constructed with large dead-woods on each side of the draw-bars, with the nature and dangers of which appellant was then unaware, and that the draw-bars were of uneven height, one being four or five inches higher than the other, which made it more difficult and dangerous to couple them, all of which was, as appellant averred, at the time well known to appellee (McNulta) and unknown to appellant. Appellant then averred that appellee was negligent in putting said cars into his trains, and in requiring appellant with his limited experience and want of knowledge to couple said cars, without first instructing him as to the danger, or furnishing him with appliances, or implements, to avoid injury.

The evidence shows that appellant began work as a switchman in appellee's yard, on the 29th day of April, 1887, and worked regularly and successfully at the business of coupling and uncoupling all sorts of cars, and cars with all sorts of dead-woods, until July 11 of the same year, on which day he was injured, so that when he was hurt he had been about two and a half months in the service. The evidence clearly shows, that during the time of his employment many thousand cars, constructed with the same sort of dead-woods, had passed through the yard where he was employed, and that some of them

had been coupled and uncoupled by appellant. The testimony also shows, that appellant was 26 years old; that the danger of coupling cars with dead-woods of that description was open and obvious, and that appellant, before he attempted to make the coupling in question, knew the kind of dead-woods that were on those cars, and knew that the draw-bar of one was four inches higher than the draw-bar of the other. There was no dispute concerning the identity of the cars, or the manner of their construction. No one was immediately present with appellant as an eye-witness to the injury, but appellant introduced a number of witnesses who testified, that it was more difficult and dangerous to couple cars with large dead-woods than it was to couple cars constructed in a different manner.

Upon the hearing of the case, the circuit judge empaneled a jury to assess the damages, but reserved all questions as to the sufficiency of the petition and evidence. The jury awarded appellant the sum of ten thousand dollars, as damages. A motion for a new trial was filed and sustained; the verdict of the jury was set aside, and the petition dismissed. From that action of the Circuit Court intervenor appealed.

THE PETITION.

The material allegations in the petition (pp. 22 and 23 of printed record) are as follows:—

"On said 11th day of July, 1887, it became the duty of and complainant was ordered by his superiors to make a coupling between two of said receiver's cars in use and then engaged in operating said railroad; said cars were constructed with large dead-woods on each side of the draw-bars, with the nature and dangers of which complainant was not then aware; the draw-bars in said cars were of an uneven height, one being four or five inches lower than

the other, making it more difficult and dangerous to effect the coupling, all of which was well known to said receiver, his agents and servants, and unknown to complainant at the time he went between said cars to make said coupling.

"Complainant avers that said receiver, his agents and servants, were guilty of negligence in putting into said train said cars constructed with said dead-woods, and conseqently unusual in use and dangerous, and said draw-bars in the dangerous condition hereinbefore described, and in ordering and requiring complainant, with his limited experience and want of knowledge of the dangers incident to said act, without any warning or information, or instruction as to the same, and without any appliances or implements being furnished him to avoid danger to himself in the discharge of his aforesaid duty, to couple said cars. When the draw-bars of said cars came together, owing to the difference in the height of the same, it became and was more difficult to make said coupling than the cars complainant had been accustomed to couple, and required more time, and while complainant was in the act of making said coupling, and in the use of all proper care and caution on his part, and the use of all knowledge on his part with which he was then possessed, and without his fault, said dead-woods and cars came suddenly together and caught complainant's right arm between the hand and elbow, and so crushed, mangled and mutilated the same as to completely destroy that part of his arm and render amputation of the same, and consequent loss of his right hand necessary, and the same was in consequence soon thereafter amputated."

THE EVIDENCE.

The material portions of the testimony offered by intervenor are as follows: —

"ADAM KOHN, the intervenor, testified: —

By MR. FORD: Q. (p. 32) Who employed you? A. Ed Clark.

Q. Who was Ed Clark? A. Night yard-master.

Q. What information did you give him at the time as to whether you had ever had any experience in railroading or not? A. I told him I had never railroaded a day in my life.

Q. What did he say to that? A. He said 'Did you intend to try;' I said 'I can not do any more than try.' Then I went home to supper; when I went back he took my dinner pail and set it down there and told me to go up in the yard and do as I was told up in the yard, opposite the round-house.

Q. Who set you to work? A. William Butler, pony engineer.

Q. What did you go to work at? A. Coupling cars.

Q. Was that the first work you did? A. Yes, sir.

Q. What day of the month was that? A. The 29th day of April, 1887.

* * * * * * * * * * *

B MR. FORD (p. 32): Q. And during that time what work did you do? A. Couple cars.

Q. Whereabouts; at the same place? A. Yes, sir.

Q. How did you get your directions, or instructions what to do? A. I did not get any.

Q. Who told you where to work, or what to do, and how to do it? A. Nobody.

Q. How did you know where to go to work? A. He told me to go up there and do as I was told.

Q. After you got started what did you do? A. The same as other helpers.

Q. What instructions, if any, did you get as to how to manage your work? A. I did not get any.

Q. What instructions did you get, if any, about how to couple cars, or to do this work? A. None at all.

Q. At any time? A. No, sir.

Q, You worked regularly up to what time? A. To the 11th day of July.

Q. And that is the day you were hurt? A. Yes, sir.

Q. What time in the day was it? A. Between four and half-past four in the morning.

Q. Where was it? A. Up near the round-house, in what they call the old yard.

Q. What were you doing at that time? A. I was making a coupling when I got hurt.

Q. On to what? A. On to a Merchants' Dispatch.

* * * * * * * * * * *

By Mr. Ford (p. 33):

Q. Who set you to work at that? A. That was our duty to make up trains. After we got the new trains made up we had to go over to the old yard and break up old trains. I had to go along with the pony.

Q. Where was this car, and how was it standing? A. The Merchants' Dispatch was standing there. If I remember right, it was alongside of seven more. It was coupled on to seven other cars and the engine had hold of the Central Railroad of New Jersey car, and Billy Butler, the conductor, cut off one car and I got left on that and rode it down into the yard. I got off and he walked by a couple and I stepped in to make it and got my arm fast.

Q. You say the Merchants' Dispatch was hitched on to how many cars? A. Seven.

Q. What kind of a draw-bar did that have? A. A patent coupler; what the switchmen call a bull-tongue link.

Q. About how long was the link? A. It was supposed to be the same length as the others.

Q. How long was it, if you know at all? A. About ten inches.

Q. In that patent coupler? A. Yes, sir.

Q. And that was stationary, was it? A. Yes, sir.

Q. And the New Jersey Central was attached to the engine? A. Yes, sir.

Q. How far away from you was it when you saw it coming down? A. It was within about a car length. I see it right along, all the time, and the pony conductor walked by the coupling and that left it for me to couple.

Q. His name was Billy Butler? A. Yes, sir.

Q. When it came down what did you find out about it? A. I see that it had a big dead-wood on it.

Q. What did you find out about the draw-bars. A. When it got so close I see that the draw-bar was so much higher than the draw-bar of the Merchants' Dispatch that it (the draw-bar of the Merchants' Dispatch) had to be raised up.

Q. Which draw-bar was the higher? A. The Central Railroad of New Jersey.

Q. That was the approaching car? A. Yes, sir.

Q. How much higher was it than the other car? A. Four inches.

Q. The link was in the stationary car? A. Yes, sir.

Q. How did you have to make that coupling? A. I had either to get my arm below the dead-wood, or else above it.

Q. Suppose the dead-wood was not there, what would you have to do to it? A. Change the link.

Q. Why? A. Because one draw-bar was higher than the other.

Q. How did that make any difference? A. It would not let the pin drop.

Q. How is it when the draw-bars are on the same level? What do you have to do with the link — any change? A. No, sir; all I have to do is just to enter it.

Q. If the draw-bars are four or five inches differences in height, what do you do? A. Change it.

Q. What else do you have to do? A. To raise the link.

Q. If the draw-bar is so much higher you have to raise up the stationary link?

Q. What did you do in this particular case? A. I had to raise up the link so as to make the coupling.

Q. Where did you have to stand in doing that? A. I had to stand on the end of the Merchants' Dispatch, between the two cars.

Q. Which hand did you raise the link with? A. The right hand.

Q. What were you in the act of doing when the dead-wood came down? A. Raising up the link.

Q. Had you got the link into the draw-bar? A. Yes, sir; I had the link into the draw-bar.

Q. Do you remember whether or not the pin had got into its place before your arm was caught? A. No, sir; the pin had not dropped.

Q. What was it that caught your arm, so far as you can state? A. The dead-woods.

Q. Which dead-woods? A. The dead-woods of the two cars; my hand did not have a scratch on it.

* * * * * * * * * * *

By MR. FORD: Q. Had you ever seen one of these big New Jersey Centrals before? A. Not that I remember of.

Q. What did you know about other cars with dead-woods on them? A. Nothing at all.

Q. Had you coupled some of them? A. I may have coupled one or two, may have coupled five.

Q. To these small dead-woods? A. Yes, sir.

Q. What do you say to the jury as to whether you ever undertook to couple these big things before? A. No, sir; not that I remember of.

Cross-Examination.

By THE COURT (p. 43): Q. Who told you to put these cars together? A. Nobody.

Q. Were there any marks on these cars? A. Yes, sir.

Q. Nobody told you to put them together on that occasion; nobody directed you to go and couple those cars? A. No sir.

By Mr. Smith: Q. You simply judged from the marks on the cars? A. I knew that the coupling was to be made on account of Butler walking by it. We was going to take the cars down below and Butler walked by it, and I knew I was supported to make the coupling. Butler was going down towards the other end of the string.

Q. You say that the draw-head of one of these cars was four inches higher than the draw-head of the other side? A. Yes, sir.

Q. Which was the higher one? A. The Central Railroad of New Jersey.

Q. And that was the one which was moving next to the engine? A. Yes, sir.

Q. Was backing up to the other car? A. Yes, sir.

Q. Could you see it as it came so as to know that it was higher? A. No, sir.

Q. You saw the car coming down? A. Yes.

Q. Did you know this — that the draw-bar was higher? A. No, sir.

Q. How do you know then? A. When I stepped in to make the coupling I could see that it was higher.

Q. Was it light so you could see it? A. Yes, sir.

Q. Perfectly light? A. Yes, sir.

Q. When you stepped in to make the coupling you could then see that the draw-head of the New Jersey Central was higher? A. Yes, sir; come to see close enough to tell the difference between them.

Q. Did you see that the dead-wood was substantially like this big dead-wood on the model? A. Yes.

Q. Could you see that? A. Yes, sir.

Q. Plainly? A. Yes, sir.

Q. And you could see that it came down below the draw-head like that? A. Yes, sir.

Q. And up above it like that? A. Yes, sir.

Q. How far below the draw-head did it come? A. About six inches I should judge.

Q. How far above the draw-head did it extend? A. About the same.

Q. And the Merchants' Despatch car had bumpers substantially like this? A. Yes, sir.

Q. You said that the lower part of the bumper came down about on a level with the draw-head? A. Yes, I think it did.

Q. Did you see the bumper of that Merchants' Dispatch car. A. Yes, sir.

Q. The link was in the stationary car? A. Yes, sir.

Q. In the Merchants' Dispatch car? A. Yes.

THE COURT: Q. That had to be lifted up to hit the car which was coming up? A. Yes, sir.

MR. SMITH: Q. When you couple cars you generally guide the link so that it will enter the draw-head on the other side? A. Yes, sir; on some railroads they compel them to use a stick.

Q. But you have always used the hand to guide the link, have you? A. Yes, sir.

Q. Do you always have to use the hand to guide the link along to enter the draw-head on the other side? A. I always did.

Q. You always have to lift the link simply, don't you? A. Sometimes you have to lift it up, and sometimes to lower it.

Q. You have to guide the link with the hand? A. Sometimes you do and sometimes you don't.

Q. Did you frequently have to guide it with your hand? A. You always have to guide it with your hand—the link drops down.

Q. You have to raise it from underneath? A. Yes.

Q. With the hand? A. Yes, sir.

Q. So that it will enter? A. Yes.

Q. And if this draw-head on the opposite side is a little higher you have to raise it up? A. Yes, sir.

Q. And if it is a little lower you have to drop it down like that? A. Yes.

Q. You don't usually find it necessary to put the pin in with your hand, do you? A. No, sir; you can set the pin up in that shape against the car before the car gets to you.

Q. When they bump together it joggles the pin down? A. Yes.

THE COURT: Q. You don't have to reach over to put in the pin? A. No, sir; you only just set it.

MR. SMITH: Q. You say that when these cars came together you got your arm pinched in between these two dead-woods? A. Yes.

THE COURT: I thought he said first that he reached over the dead-woods? A. I had my arm in under the dead-woods.

Q. To guide the link? A. Yes, sir; and the link was heavy.

Q. How did your arm get between the bumpers, then? A. I don't know.

MR. SMITH: Q. You don't know how it got there? A. It was by raising up the link.

THE COURT: Q. You raised the link so much that it brought your arm up between the bumpers? A. Yes, sir.

MR. SMITH: Q. You worked in the employ of the company all of May and June and up to the 11th of July, did you not? A. I worked some of the time extra in May—the first part of May I worked extra.

Q. What do you mean by 'extra'? A. An extra man—that they didn't have no place for me.

Q. About ten out of a hundred? A. Yes, sir.

* * * * * * * * * * *

By MR. FORD (p. 57): Q. What kind of a car is the Wabash; have they any dead-woods? At No, sir: I never see any.

Q. Compared with the Wabash car that had no dead-woods at all, what would you say about the difficulty of making a coupling on a car with these things on? A. I will take the cars without dead-woods; they are safer.

Q. Why? A. Because a man is liable to catch his arm in them.

Q. What is the difficulty with these? A. They come closer.

By THE COURT: Q. What do you say? A. I will take mine without the dead-woods; the dead-woods are more dangerous I think.

By MR. FORD: Q. What makes these more dangerous? A. If a man would stick his arm in there and then two dead-woods come together it would catch him.

By THE COURT: Q. If a man puts his arm between the bumpers it will be mashed all to pieces? A. Yes, if you leave it there. Of course you have got to put your hand in there to reach the link.

By MR. FORD: Q. What is the difficulty in making the coupling with that thing on there with safety to the man who is working? A. If he puts his arm in there and leaves it there it will catch him. Of course a man can take a stick and couple.

By THE COURT: Q. Tell the jury how is the proper way to couple these bumper cars? A. If I was going to couple it I would take and set the link.

Q. What is the proper way? A. That is all the way I can tell you. I most generally set the link and start it so it will go into the other draw-bar.

Q. Then what? A. Then get away from it.

Q. Is that the usual and proper way to do it? A. That is the way I would do it.

Q. Is that the way other brakemen would do it? A. I could not tell you.

By MR. FORD: Q. How long have you been a switchman? A. Eight or nine years.

Q. Do you consider that the only safe way to do it? A. I think so.

Q. How do you couple Wabash cars without the drawbars coming together. Is there any danger about those? A. Not so much; of course a man coupling cars can get hold of the link on these Wabash cars and enter it and that is all there is of it.

Q. The danger with these is in entering the link, of these timbers catching your arm? A. Yes.

Q. And they set the link in the approaching car and get back out of the way? A. Yes, sir.

By THE COURT: What do you mean by setting the link? A. The link hangs a little down; you can put a little stick of wood under it and hold it up.

Q. You make a little piece of wood answer the purpose of your hand in holding it up? A. Yes, sir.

Q. How did you learn how to do it? A. I got on to it.

Q. How? From experience? A. Yes, sir.

Q. If you had ever seen or coupled one of these cars what would you know as how to do it? A. I don't know how I would tackle it.

Q. What would you say to a man being able to couple one of these cars who had never seen one, or coupled one, with safety to himself, if he didn't know anything about it? A. It would not be very safe I don't think, if he didn't know how to manage the thing.

Q. You said something about a stick. You mean that a stick would be put in here and raise up the link? A. Yes, sir.

Q. Is there any way of making that coupling with a stick from below and standing back out of danger? A. You could put a stick between the draw-bars and let it crush the stick.

Q. Let the stick come in place of your arm? A. Yes, sir.

Q. How could a man, an experienced man go to work to couple a thing of that kind when these big bumpers are up and down? A. Just the way I say.

Q. That is putting the pin in and getting away? A. Yes.

* * * * * * * * * * *

By THE COURT (p. 59): Q. The use of the bumpers makes it necessary for a man carefully to make the coupling. He has got to look out and see what he is doing, has he not? A. Yes, sir.

Q. If he puts his hand or arm between the bumpers he gets it mashed? A. Yes, sir.

Q. But they do not come close enough to hurt him? A. He can enter the link and get away, but you can get hurt on these cars just as well as any other cars.

Q. You could stand inside the draw-bars to guide the link without its hurting you? A. Yes, sir.

Cross-Examination.

By MR. SMITH (p. 60): Q. If a man keeps his arm below the level of this, he is all right? A. Yes, sir.

Q. It would be possible to make a coupling between two cars by keeping your hand below the level of this cast iron bumper, and then a man would be perfectly safe, wouldn't he? A. I think so.

Q. And he could not be hurt unless he got it above the level of the draw-bar? A. No, sir.

Q. So that a man could make a coupling between these

cars with safety, if he exercised caution? A. I think he could.

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By Mr. Smith (p. 61): Q. Your idea is that during the time that you were there about one-tenth of the cars which come through were provided with dead-woods like that there? A. The New York & Lake Erie road has dead-woods looking something near.

Q. The Lehigh Valley have got big dead-woods? A. Yes, sir.

Q. Your idea is that about ten out of one hundred had bumpers of one or the other kind? A. Yes, sir.

Q. And of those ten about half of them would have the long bumpers? A. Yes; but I wouldn't say that at that time while he was at work though.

Q. That is about the average? A. Yes, that is about the way it runs the year round.

Q. It is not different at that time from what it usually was? A. About the same.

James Caldwell, witness for appellant, testified that he had been a switchman since 1872. He worked in the Wabash yard but was not present when appellant was injured.

By Mr. Ford (p. 65): "From your experience on other roads where you have had these cars, what do you say about the difficulty or danger of coupling these cars with these big dead-woods on them? A. I say they are more dangerous than the common dead-woods.

Q. Why? A. Because they are longer up and down, and you have no chance to get your arm under them or over them. The other draw-bars are just the same as — here is the draw-bar, right on here, and here is the dead-wood, and you can get your arm under them or else you can get it over them.

Q. And not have any danger? A. Not have any danger whatever.

Cross-Examination.

By MR. SMITH (p. 66): Q. Do you say there were twice as many cars come through the Wabash yards while Kohn was there employed that had these long dead-woods on than those which had these short bumpers? A. You take the different lines that come through the Wabash yard outside of their own cars and I guarantee that two to one are handled with the high dead-woods; as to the others.

Q. Twice as many of the dangerous ones, the big long ones as of the others which are not so dangerous? A. Yes.

CHRISTOPHER KOHN, a witness for appellant, testified that he had been switching about four years. He was a brother of appellant and was working in the Wabash yard at the same time, but was not present when appellant was injured. His testimony on direct-examination did not differ materially from that of the preceding witness. But on cross-examination he stated:—

By MR. SMITH: Q. Did anybody ever give you instructions as to how to couple cars with long dead-woods? A. No, sir.

Q. Do you mean to tell the jury, that a man can not couple these with the hand without getting caught? A. Not where there is two of them; he can not do it.

Q. He can not do it? A. No, sir.

Q. You say you have coupled them together about ten times in your experience. How did you do it? A. I would stand back and take a club.

Q. You always take a club? A. Not always; I some times set the pin and let it couple itself.

Q. But you never put your hand in? A. No, sir.

Q. Why not? A. Because it would catch my arm.

Q. You think it would catch your arm? A. I know it would.

Q. Was it so plain that you know it would catch your arm? A. If you had worked at as long as I did you would know it.

Q. How did you know it the first time — know about not getting your hand in there? A. It stands to reason; it did to me.

Q. You take a stick or else set the link and let it make itself? A. Yes, sir.

Q. How many cars of this kind of bumpers came through the yard during the few months that Adam was in the yard there? A. I couldn't tell.

Q. The bumpers of the Merchants' Dispatch was substantially like this model? A. Yes.

HENRY HOLLAND, witness for appellant, testified (p. 73) that he had been switching and coupling cars about two years and a half.

By MR. FORD (p. 74): Q. What do you say to the jury as to the danger or difficulty of coupling these cars over and above the ordinary car? A. They are not safe.

Q. Why? A. There is no way to get at them and make the coupling unless you have a big club and keep outside of the cars.

Q. How would you do it? A. Take it and stick it in there and if it mashes up it is all right. I wouldn't put my arm in there for anything.

Q. If you were going to use your arm, how would you do? A. There is no way of putting your arm anywhere around that dead-wood for to get two of them together; there is no way of getting it out, unless you put a stick in there and let it mash; once in a while you can put the link in there where it is level and let them come together, but you

couldn't do that when they are of different heights; you have got to lift the link up.

Q. Suppose the draw-bars of the coming car was three or four inches higher than that of the stationary car? A. Then the link would have to go over the top, and you would have to raise the link up so high, or get the draw-bar raised up and then you have to get a club to make the coupling.

Cross-Examination.

By MR. SMITH (p. 75): Q. When you did couple them how did you do it? A. With a club, or I would take and set the link so it would make itself.

Q. In every case? A. Yes, sir.

Q. You never coupled with your hand at all? A. No, sir. I never put my fingers inside of them at all.

By THE COURT (p. 76): Q. You could see that it was dangerous? A. Yes; but you take them long bumpers in working out nights, it is hard to see them; you think it is one of them end blocks. In the night the lamp don't throw light enough to see them very handy.

By MR. SMITH: Q. You can see them in the daylight? A. Yes.

By THE COURT: Q. You would have to have the trouble to see whether there were bumpers? A. You have got to watch them pretty close to see them.

Q. You could see that there were bumpers on? A. Yes, sir.

Q. Then you would have to take care? A. Yes, you have got to watch out for them then.

By MR. SMITH: Q. You say you never went in between two cars to couple with the hands both of which had these long deadwoods? A. No, sir.

Q. What cars — of what companies — had these long

dead-woods? A. The Lehigh Valley, the D. L. & W. and the Central Railroad of New Jersey; there is another, I forget what.

Q. The P. & R. cars? A. I forget; there are three or four different companies that has got them.

FRANK HENIMGER, witness for appellant, testified (p. 78) that he had been switching for about five years. He worked in the same gang with appellant and saw the cars between which appellant was hurt, but didn't see him injured.

By MR. FORD (p. 79): Q. Will you state to the jury whether it was a common thing to have these New Jersey Central cars in service while Mr. Kohn was there? A. It was a very common thing to couple these kind of cars together for me.

Q. I mean to have them on the Wabash service when he was there — during those two months and thirteen days? A. I cannot answer about that part of it; I have handled a great many of them cars.

Q. During the spring that he was there what would you say as to whether it was a common thing or an unusual thing to have one of those cars in the service? A. I couldn't say anything about in regard to the Central Railroad of New Jersey, but it was a common thing to have those dead-woods in the yard of the same kind on other cars.

Q. What other road had them? A. The D. L. & W., the P. & R — the Pittsburg, I think — the Philadelphia & Reading and the Lehigh Valley; I think that is all.

Q. Do you say it was a common thing to have the cars of the Lehigh Valley go over your road? A. Yes, sir.

Q. Ain't that a coal country. Loaded with coal? A. They handle considerable coal, they used to come in loaded with iron occasionally.

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By Mr. Ford (p. 81): Q. Suppose your link is stationary and the approaching car—the drawbar, is five or six inches higher than that car, would that increase the difficulty to make the coupling? A. There is generally one or the other of them higher or lower; there are hardly ever two cars of the same height.

Q. Supposing one is four or five inches higher than the other? A. They are different kind of cars and as a matter of course they were of different heights and builds.

Q. You have not answered my question. When it is four or five inches higher than the other, what then? A. You have to raise the link up.

Q. Does that increase the difficulty of making the coupling? A. I don't know where it would, you have to put your hand in there anyhow. As long as you have to put your hand in there you might as well raise it up. It won't take any longer to raise it five inches than an inch.

Q. How much will that weigh? A. About four or five pounds.

Q. When you come to one of these Valleys, how do you manage them? A. In the same way; you put your hand right in them.

Q. Between the faces of these draw-bars and get hold of the link and guide it into the approaching draw-bar? A. Yes, that is the way you can do it.

Q. Can't you do it with a stick? A. Yes, if you can get one, but you would be equally as safe I think with your hand. I never use a stick.

Q. How would you do it? A. I would raise the link; that is the only way I ever couple a car of that kind.

By the Court: Q. You do not pretend to tell the jury that you would put your hand right betweent he bumpers? A. That is the way I always couple them; I have coupled for five years.

Q. You never got caught? A. No, sir.

Q. If the bumpers came together you would get caught? A. The link projects out between eight and ten inches in which you can enter it into the draw-bar and take your hand out at least eight inches before; they don't come together; the link has to go in the other draw-bar before they strike together; that would leave six or eight inches.

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By Mr. Ford (p. 82): Q. Then what would you say as to the comparative danger of all these kind of cars — that is with the other — whether this is more dangerous; and if so, to what extent? A. I never felt any danger.

Q. No? I want your judgment as a switchman; you boys never feel it until you are smashed up; but I mean your judgment as a practical railroad man? A. A man would have to be careful in coupling.

Q. Would you say that would be an unusually dangerous machine? A. I don't think it is.

Q. What? A. I don't think so.

Q. You don't think so? A. No, sir.

Q. What would you say of a man of only two months' experience in his life of railroading being able to manipulate that without any instructions or cautions or directions, being able to manipulate a coupling of that kind with safety, even with the best of care? A. If he didn't use good judgment I should think it would be dangerous if he didn't use great care.

Q. As to using care, what would you say as to the necessity of having more or less experience and knowledge of the operation of these cars, not only care but experience? A. I suppose it is necessary for any of us to have experience at anything.

Q. Ain't it more necessary in this business than in some others? A. No, sir; I don't think it is.

By the Court: Q. Looking at it you could see what the danger was? A. That is the way I look at it.

By Mr. Ford: Q. Supposing a man had never coupled one of those cars in his life and had never seen the two come together, do you say he would by merely looking at that apparatus comprehend his danger? A. I think he ought to.

By the Court: Q. Do you mean that he ought to see? A. Yes, sir.

Cross-Examination.

By Mr. Smith (p. 83): Q. It was perfectly light when this accident happened, was it not? A. Yes, sir.

Q. As light as it is now? A. Yes, sir.

Q. You were at the end of the train? A. Yes, sir.

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By Mr. Smith (p. 84):

Q. You say these long bumpers are used on the Central Railroad of New Jersey — the Philadelphia & Reading, the Lehigh Valley and the Delaware, Lackawanna & Western? A. Yes, sir.

Q. All of those cars came frequently through the Wabash yard at or about that time, didn't they? A. Yes, sir.

Q. You had occasion quite frequently to couple cars with that kind of dead-woods? A. Yes, sir.

Q. You had? A. Yes, sir.

Q. Did you have a stick in doing it? A. I never used a stick in my life.

Q. As I understand your statement, the link comes out about six inches from the face of the dead-woods, and you thought you could get your hand out after the link entered the draw-bar, and before the bumpers came together? A. I don't think anything about it; I have done it lots of times; it is the way I always do it.

Q. How many couplings have you made of these cars

with these long dead-woods? A. I couldn't tell you; I have done it a great many times.

Q. How often did you have occasion to use it in the course of two months? A. Probably five hundred times.

Q. I suppose it is somewhat more dangerous to make a coupling with the dead-woods of this kind, than it is where there are no dead-woods? A. Yes, sir.

Q. Because there is more danger of getting your arm in between the dead-woods? A. Yes, sir; and the difference is, that you have to use more care.

Q. If you attempted to make a coupling with these than you do with the other kind? A. Yes.

Q. And you always did exercise more care? A. Yes, sir.

Q. Did anybody ever give you any instructions about how to make a coupling of that kind of dead-wood? A. No, sir.

Q. You can see for yourself that you have got to be more careful? A. Yes, sir.

Q. It is plain that a man has to be more careful, is it not? A. I think it is.

JOHN SHAY, witness for appellant, testified (p. 85) that he was yard clerk at the time of the injury.

By MR. FORD: Q. Is it a general thing or an unusual thing to have one of those cars of the Central Railroad of New Jersey in the service? A. I have seen them quite frequently in the yard.

By THE COURT (p. 86): Q. How many in a month? A. Sometimes there—

Q. How many on the average of the Jersey cars? A. I should say sometimes ten or twenty a month, may be more or may be less.

By MR. FORD: Q. How was it at the time that Adam

was working—about the same? A. Yes, sir, as near as I can remember.

Q. What is the usual make-up of the trains on the Wabash there, its cars or foreign cars? A. Both; it is usually Wabash cars; sometimes we get more foreign cars than Wabash, but as a general thing they are Wabash.

Q. Do you know what cars were in use that came over your line aside and independent of the Jersey Central, which had these big dead-woods, or did not you observe them? A. I have observed them on lots of other cars.

Defendant's Evidence.

SAMUEL GROSSE, witness for defendant, testified (p. 88) that he was yard master at the time appellant was hurt. He didn't see him injured.

By MR. SMITH (p. 89): Q. At the time that Adam Kohn was hurt what is your best judgment as to the number of cars that came through at that time on the average which would be provided with one of these buffers? A. I would say about one out of every twelve.

Q. About how many cars a day of these freight cars come through the yard — of trains to be made up — going either way — east bound and west bound — about that time? A. I could say that I could tell better during the whole time that he was employed.

Q. During the whole time? A. There was about twelve thousand cars passed through each way.

By THE COURT: Q. During the two months, you think? A. Yes, sir.

Q. And that one thousand of them were with bumpers? A. Yes, about one thousand.

By MR. SMITH: Q. About what proportion of those twelve thousand cars were foreign cars, other than

Wabash cars? A. It would be rather guess work to tell, but I should judge that out of the twelve thousand there surely was five thousand foreign cars during the two months and a half, and that estimate would be Wabash cars.

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By Mr. Smith (p. 90): Q. Do you know what the object of this dead-wood is? A. I have never had anyone tell me what the object of them is, but I judge from my own experience that they were to keep the shock of the car from the draw-bar.

Q. To relieve the shock of the cars from the draw-bars? A. Yes, sir.

Q. Do you know how many companies whose cars were going through the yard about that time had dead-woods of this large make. A. Well, there was the Lehigh Valley and the P. & R. — Philadelphia & Reading — and the D. L. & W. I think the P. & R. and Lehigh Valley were more numerous than the other cars.

Q. Are the dead-woods on them just about the same as on the others? A. About the same.

Q. About how long are the deadwoods, up and down? A. I would estimate them at about fourteen and fifteen inches — between fourteen and seventeen inches.

Q. Did you examine these two cars, the Central Railroad of New Jersey car and the Merchants' Dispatch car, after Mr. Kohn was hurt? A. Yes, sir; I saw them.

Q. Did you see the character of the dead-woods or bumpers? A. Yes, sir.

Q. I will ask you if this would represent, with tolerable accuracy, the bumpers on these two cars? A. It does, very much.

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By Mr. Smith (p. 91): Q. State to the jury whether these draw-heads were or were not on a line? A. To the

best of my judgment, they were very nearly on a level, or about on the level — the draw-bars were.

By THE COURT: Q. Then the Jersey car was not higher than the other? A. A very little, if any.

Q. How many inches? A. Of course, it would be an estimate, but I should judge it was about two or three inches.

By MR. FORD: Q. Or four inches? A. No, sir: I don't believe it was four.

By MR. SMITH: Q. Two or three inches — no more than that? A. No, sir.

Q. When the cars came together — state to the jury whether or not the draw-heads are a little above one another when the cars come together? A. Cars are not uniform. Of course, where railroads are handling such a numerous amount of all kinds of cars, one build will be a little higher or lower than the other. I have noticed that quite frequently, and I know we are building new cars at the present time that are higher than our old cars, simply because I presume the old cars have settled down in their bearings to some extent or the springs have given way in some way.

Q. What is the effect uniformly on trains in the yard as they are called upon to couple them? A. Sometimes you find one train with the draw-bars all on a level, and then again you will find trains where about half the draw-bars would be a little higher or lower than the others; it is a frequent thing to find them in that way.

Q. How frequently? A. I couldn't say.

Q. Half of the time will they be a little bit off? A. No; I wouldn't say half the time; about one-third of the number of cars it might be.

Q. What would you say as to the comparative safety of coupling two cars with these long dead-woods compared with the Wabash cars which you are using to-day? A. Those dead-woods, as a matter of course, are dangerous.

Q. They are dangerous? A. Yes, sir.

Q. They are more dangerous to a switchman getting his arm caught than when they are not used? A. Yes, as a matter of course.

Re-examination.

By MR. SMITH (p. 98): Q. You have spoken of the danger of the coupling together of two cars provided with these dead-woods. I will ask you whether or not that danger is obvious and open, one that anybody could see by looking at it? A. As I said before, if I saw two cars coming together like that I wouldn't go in.

By THE COURT: Q. Would an ordinary brakeman see the danger when he saw the character of the cars? A. I don't see what would prevent him from seeing the danger.

Q. Was it so that everybody could see it? A. It is right on the face of the car. Right on the front of the car.

Q. You said something about being his duty not to make the coupling. What is the usual custom about making couplings; are they compelled to make them? A. No, sir.

By MR. SMITH: Q. Hasn't it often been that two or three efforts are made before the coupling is made? A. Yes. Oftentimes two or three times they come together too hard; I should reprimand a man for attempting to make the coupling if they went together too hard; we allow them to use their own judgment.

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By THE COURT: Q. Is there any rule that tells how to couple cars? A. No, sir.

FRANK HOWARD, witness for defendant, testified (p. 100) that he had been railroading twenty-five years, and that for the last three years he had been in charge of the Wabash shops and was familiar with the working of cars.

By MR. SMITH: Q. Do you know what these large dead-

woods which some of tbe roads use, are put on the cars for? A. I think for the protection of the draw-bar.

By THE COURT: Q. There is no protection to the car itself, is there? A. Well, it is a protection to the car because if a draw-bar should break the bumpers can come together.

By MR. SMITH (p. 101): Do you know about how many of the roads of this country were, until about a year and a half ago, using those large dead-woods? A. I cannot say exactly how many, but several roads are using them which has been mentioned here; the Pennsylvania, the D. L. & W., the Lehigh Valley and the Central Railroad of New Jersey. I do not know anything about their cars at all.

Q. Are they using these large dead-woods as much now as they did a year and a half ago? A. No, sir; I don't think they are. I think as they increase their rolling stock they use a different construction.

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Q. I will ask you whether the queston of the utility of using these dead-woods upon the ends of railroad cars has been discussed among car builders and the master mechanics of railways sometimes? A. Yes, sir; it has.

Q. Has it been much discussed? A. To a considerable extent, yes, sir.

Q. Is it still being discussed, that question as to the propriety? A. No, sir, it is not.

By THE COURT (p. 102): Q. Is it settled that they do not make any more that way? A. No, sir, they are not building any more of that build.

Q. Is it customary to use your machinery until it is worn so as to require re-building? A. Yes, sir.

Cross-Examination.

By MR. FORD (p. 102): Q. Wasn't it the general voice of the mechanics of this country, so far as you know,

in the discussion of that thing, that that kind of a coupling ought to be damned and abolished? A. I never had my attention called to it in that way. I must say that all the cars constructed years ago — you see no cars built of that description now. There is uniformity of length and height and the general construction of the cars. There is but one car built now.

Q. That is the same as it is about the gauge of the roads? A. Yes, sir.

Q. Isn't it considered to be a dangerous thing to be used in the service, and wasn't that considered? A. I think it was.

JOHN BOYER, witness for defendant, testified (p. 104) that he was a foreman of freight construction and repairs for the Wabash, St. Louis & Pacific Railway. He examined the cars between which appellant was injured. One was a Central Railroad of New Jersey and the other was a Merchants' Dispatch Transportation car. The draw-heads of those two cars were on a level when he saw them coupled together in the yard. That was about two hours after the accident. The balance of his testimony was unimportant.

The Charge of the Court.

At the conclusion of the testimony, the court instructed the jury as to what they would consider in estimating appellant's damages, and limited their inquiries expressly to that subject. In so doing the court (page 109) said:—

"Gentlemen, in order to save all questions that legally arise in this case, I have suggested to counsel that the jury may regard the plaintiff's right to recover damages in this case as being settled, and we simply submit to your judgment and take your opinion as to how much the

plaintiff is entitled to recover by reason of the damages for the injury of which he complains."

Verdict Set Aside and Petition Dismissed.

Under the instructions of the court, the jury assessed the damages sustained by appellant at the sum of ten thousand dollars, but on motion of the receiver the verdict was set aside and final decree was entered dismissing the petition, and from that decree an appeal was taken.

POINTS.

1st. It was not error for the Circuit Court, in a chancery proceeding, like this, to empanel a jury to assess the damages sustained by appellant and then, after hearing all the evidence, disregard their finding and dismiss his petition.

2nd. It was not negligence for the receiver to admit into his yards and haul over his road in his trains, cars which were in good repair, but which were constructed on a plan less safe, for his employes, than were the cars of his own road made after a different pattern.

3rd. The defects in the cars of which appellant complains were open and obvious to any one. The evidence shows that he was an experienced switchman, he having worked two months and a half in coupling all sorts of cars in the same yard, and under those circumstances he assumed all the risks of injury.

4th. The fact that the draw-head on one of the cars was higher than the draw-head on the other, furnishes no ground for recovery, because appellant testified that he knew of the inequality before he attempted to make the coupling.

BRIEF.

I.

It was not error for the Circuit Court, in a chancery proceeding, like this, to empanel a jury to assess the damages sustained by appellant and then, after hearing all the evidence, to disregard their finding and dismiss his petition.

Upon the hearing of this case in the court below, a jury was empaneled to determine *the amount of damages* intervenor had sustained from the injury, but no other issue was submitted to them. They assessed his damages at the sum of ten thousand dollars, but the court, after hearing all the testimony, set aside the verdict and dismissed the petition. In that there was no error.

The suit was a dependent one. It was instituted to obtain an allowance against a fund which was being administered by a court of chancery, and the question of whether upon the petition and evidence appellant was entitled to have any compensation for his injury, was a matter for the determination of the chancellor and not a question for the jury. Appellant did not have leave, or even ask leave, to sue the receiver in a court of law. He only asked and obtained leave to intervene in the chancery case, and it was entirely competent to empanel a jury to hear the evidence and assess the damages, and for the court to reserve to itself, the question of whether upon the testimony appellant was entitled to any allowance out of the fund in court.

In *Barton v. Barbour* (104 U. S. 130) this court said:—

"If the adjustment of the claim (the case being one for damages against a receiver) involves any dispute in regard to the alleged negligence of the receiver, or any other fact

upon which his liability depends, *or in regard to the amount of damages sustained by a party*, the court in a proper case in the exercise of its legal discretion, either of its own motion or on the demand of the party injured, may allow him to sue the receiver in a court of law, *or direct the trial of a feigned issue to settle the contested facts.*"

In this case no question of fact, with respect to the alleged negligence of the receiver, was submitted to the jury. In charging the jury, at the conclusion of the testimony, the court (p. 109 of printed record) said:—

"Gentlemen, in order to save all questions that legally arise in this case, I have suggested to counsel that the jury may regard the plaintiff's right to recover damages in this case as being settled, and *we simply submit to your judgment, and take your opinion as to how much the plaintiff is entitled to recover by reason of the damages for the injury of which he complains.*"

But even if the court had submitted an issue of fact, with respect to the negligence of the receiver, to the jury, it was still entirely competent for the court to disregard their finding, and decree against it.

In *Allen* v. *Blunt* (3 Story, 746) Judge Story said: —

"A verdict upon an issue ordered by a court of equity is in no just sense final upon the facts it finds or binding upon the judgment of the court. The court may at its pleasure set it aside and grant a new trial, or disregarding it, may proceed to hear the cause and decide in contradiction to the verdict; or it may adopt the verdict *sub modo* and give it a limited effect only. But it can never be known what effect is given to the verdict, or whether any is given to it until the subsequent hearing upon the merits and a decree rendered thereon by the court."

See also 2nd Daniell's Chancery P. and P. (5th American ed., 1148) and cases cited in note.

In Cochran *v.* Moss (10th Mo., 417) the court, in considering the same question, said:—

"The first question presented for our decision is, whether the chancellor, after the finding of an issue by the verdict of the jury, can disregard that finding and decree against it. Under the English Chancery practice he unquestionably has that right, and it is of every day occurrence to do so."

It is hardly necessary for me to remark, in this connection, that the chancery jurisdiction, and powers, of our Federal courts are the same as those of the High Court of Chancery in England, except where modified by acts of Congress or rules of the Supreme Court.

Noonan *v.* Lee, 2d Black, 499;
Orchard *v.* Hughes, 1st Wall. 75.

Therefore, there was no error in the formal proceedings of the court, and its finding and judgment should be affirmed, unless appellant was entitled to recover on the substantial merits of his case.

II.

It was not negligence for the receiver to admit into his yards and haul over his road in his trains, cars which were in good repair, but constructed on a plan less safe for his employes than were the cars of his own road, made after a different pattern.

That proposition was expressly ruled in the following cases: —

Baldwin *v.* R. R. Co., 50th Iowa, 680;
Ry. Co. *v.* Flanigan, 77th Ill. 365;
Railroad Co. *v.* Smithson, 45th Mich. 212;

Hathaway *v.* R. R. Co., 51 Mich. 253;
Thomas *v.* Ry. Co., 18th S. W. Rep. 980.

In *Baldwin* v. *Railroad* (*supra*), the action was by a brakeman to recover for an injury received in coupling cars with dead-woods of an unusual construction, and such as were not then in use on the cars of defendant. There was a verdict and judgment for plaintiff, in reversing which the court said: —

"It does not constitute negligence for a railway company, in the ordinary course of business, to receive and transport the cars of other roads, in general use, which may not be constructed with the most approved appliances, and the transportation or use of such cars by the company is one of the risks which an employe assumes in undertaking the employment."

In *Railroad Co.* v. *Flanigan* (*supra*), a freight conductor, whose duty it was to make couplings, was injured while attempting to couple two cars equipped with "double buffers." The cars alleged to have caused the injury did not belong to the defendant, one being a White Line car, and the other belonged to the Baltimore & Ohio Company. The plaintiff had judgment in the Circuit Court for $6,000, and in reversing the case the court said: —

"A railway company will not be liable to an employe for personal injury received while coupling cars, having double buffers simply because a higher degree of care is required in using them than in those differently constructed.

If a servant of a railway company knows that the company is operating a class of cars which are unsafe, when he enters its service, and he continues in the same, he will assume the risks and hazards of the service, and can not recover for a personal injury from the use of such

a class of cars, the company being guilty of no negligence."

In *Railroad Co.* v. *Smithson* (*supra*), the suit was brought by a switchman who had his hand caught while attempting to couple two freight cars belonging to another company and which were constructed with "double dead-woods." He alleged that the use of double dead-woods was unusual and in the highest degree dangerous to persons employed by defendant in making up its trains, etc. The plaintiff recovered in the Superior Court of Detroit a judgment for $5,000, and the company appealed, and in reversing the judgment the court said: —

"But it is said (page 219) that even if it be not negligence in another company to use these cars, it is negligence in defendant to receive them among ohter cars, and to send its switchman to make up trains with them without giving them notice of the difference. The desirability of notice is manifest, but how it is to be given is not so plain. It appears that the company inspects every car offered to it by another for transportation, and marks for rejection all that are considered unsafe, and sets them aside; and it is said that the company should mark in the same or some similar way all the cars which do not couple like its own, and then brakemen would be put upon their guard. As coupling is required to be done at all hours of the day or night at all points on defendant's line, and often under circumstances of great haste, the marking would need to be something the switchmen would instantly perceive without groping about for it, and in respect to which there could be no confusion and no mistake. The best marking might perhaps be a placard of some sort at the end of each car, where it would readily attract the attention of the coupler; and as there are several different kinds of car, so there would need to be as many different placards. The differences in these would be confusing and likely to lead to mistakes. But we have had produced for our inspection, on the argument, a model of the double dead-woods which caused the injury, and it seems impossible to give to the coupler

any better or more effectual notification of their presence, and of the difference from those belonging to the defendants than their very form necessarily gives of itself. The difference is very marked and striking, and it is quite impossible to couple the double dead-woods, or to approach them for the purpose, with any degree of attention, without observing it. This is so whether the coupling is done in the day time or night time: for in the night every switchman has his lantern with him, or should have it on all occasions. If, therefore, a switchman were to declare that he had attempted to couple the double dead-woods without noticing how they differed from the cars of defendant, the conclusion would be inevitable that he had gone heedlessly in the performance of a duty requiring great care, and that he had not allowed his eyes to inform him what was before him. Moreover, the business of the road was of itself a notification that many differences requiring attention in coupling were to been countered by the switchmen and brakemen. The Michigan Central is a great common way for the cars of all the railroad companies of the country, and every man in the employ of the defendant, if he has ordinary intelligence, is perfectly cognizant of the fact. He knows, too, that the cars of the several railroad and transportation companies differ, and that at one time or another all these differences may appear in the cars he may be called upon to couple or uncouple. Every train is likely to have several kinds, and he cannot assume, as he passes from one to another, that the two will be alike, much less that the whole train will be. To notify him specially of the differences would not only be troublesome and expensive, and oftentimes, as above explained, confusing, but it would be a work of supererogation; for any man capable intelligently of performing the duty would be no wiser after the notice than before, and a man who would not heed the information the very nature and course of the business would impart to him, would be protected by no notice. The best notice is that which a man must of necessity see, and which cannot confuse or mislead him; he needs no printed placard to announce a precipice when he stands before it."

Thomas v. *Ry. Co.* (18th S. W. Rep. 980) is a recent

case of the same sort, and in reviewing the authorities the Supreme Court of Missouri there said:—

"It was his (the switchman's) duty to switch cars and couple cars — all cars that were in sound condition and good order — no matter what their peculiar couplings were nor from what quarter they came. This was the measure of his duty and his service, and this was the measure of his risk as an incident of that service. That a servant assumes such risks as are thus incident to the service in which he engages is so well supported by authorities that it seems to be a work of supererogation to cite or quote from them. And the rule as to the assumption of such risks is not varied, or in any manner affected, by the hazardous nature of the employment. Whatever hazards are concomitants of the employment, such hazards the employe assumes necessarily when engaging in the performance of the duties pertaining thereto.

* * * * * * * *

And it has been expressly held in several well considered cases, that one of the risks a railway employe assumes on entering the employment is the risk which attends the reception and transportation of cars from foreign companies, though they be not constructed with the most approved appliances, and that it is not negligence on the part of a railway company to receive and transport such cars in the ordinary course of its business."

Certainly upon the law, as declared in the foregoing cases, it cannot, in this case, be held that the receiver was negligent in permitting cars, of other companies, equipped with large and long dead-woods, to come into his yard, or in hauling them over his road in his trains.

III.

The evidence shows that appellant was an experienced switchman, he having had two months and a half experience in coupling all

sorts of cars in the same yard, and the defects in the cars of which he complained were open and obvious to every one.

In this case it was not alleged, nor is it now contended, that either of the cars in question were out of repair. The charge is, that *the cars were of a dangerous and faulty construction;* that appellant was inexperienced in the business and had never been properly instructed or warned of the danger. As to the latter averments, the evidence offered in his own behalf shows that appellant was twenty-four or twenty-five years old; that he had already worked successfully at the business of coupling and uncoupling cars in the same yard for two months and thirteen days, and that during that time one-twelfth of all the cars passing through the yard were equipped with large bumpers similar in form to those on the cars by which he was injured. Under such circumstances and upon that testimony it would have been unreasonable for the court to have found, as a fact, that appellant *was so inexperienced* as not to recognize the danger of putting his arm between bumpers constructed as those were.

Surely it required neither instructions nor experience to inform him of a danger so obvious.

The testimony of FRANK HEMINGER, witness for appellant, shows conclusively, that the danger of coupling the cars in question was obvious to any one. On that point (*ante* page, 23 and 24) he said:—

BY THE COURT: Q. Looking at it you could see what the danger was? A. That is the way I look at it.

BY MR. FORD: Q. Supposing a man had never coupled cars in his life, and had never seen two of those come together, do you say he would, by merely looking at that apparatus, comprehend his danger? A. I think he ought to.

BY THE COURT: Q. Do you mean that he ought to see? A. Yes, sir.

And again, SAMUEL GROSSE the yardmaster, testified (*ante*, page 29), in the same way: —

BY THE COURT: Q. Would an ordinary brakeman see the danger when he saw the character of the cars? A. I don't see what would prevent him from seeing the danger.

Q. Was it so that everybody could see it? A. I don't see what would prevent him from seeing the danger.

Q. Was it so that everybody could see it? A. It is right on the face of the car. Right on the front of the car.

Q. You said something about his duty not to make the coupling. What is the usual custom about making couplings; are they compelled to make them? A. No, sir.

BY MR. SMITH: Q. Hasn't it often been that two or three efforts are made before the coupling is made? A. Yes; oftentimes two or three times they come together too hard. I should reprimand a man for attempting to make the coupling if they went together too hard. We allow them to use their own judgment.

Q. Is there any rule that tells how to couple cars? A. No, sir.

Under that testimony, and considering the fact that appellant had been *for two and a half months* engaged in coupling all kinds of cars, there is absolutely no force in the suggestion *that he had not been instructed* with respect to the danger.

In *Hathaway* v. *Railroad Company* (51 Mich. 253) the plaintiff was brakeman in the employ of the Michigan Central Railroad Company and was injured while attempting to couple together two New York, Lake Erie & Western cars, both of which were constructed with "double dead-woods." In that case the Michigan Central cars, like those of the Wabash, were constructed with single dead-woods, and plaintiff claimed never to have seen any cars with "double dead-woods" on them before.

His experience in the business was extremely limited, he

having made *only three trips over the road* prior to the one on which he was injured, but he had been warned by the conductor, and others, in a general way, that all couplings were dangerous.

In that case the plaintiff recovered a judgment for $9,000., and the court in reversing it said:—

"The omission of a railroad company to warn an inexperienced brakeman of the specific danger of coupling cars that are furnished with double dead-woods does not make the company liable for an injury received by him in so doing, if the risk is such as to be manifest to any person, and if, on being employed, he was warned in general terms of the perils of coupling cars of different construction, and was told not to take any chances."

In *Tuttle v. Ry. Co.* (122 U. S. 189) the action was by a brakeman injured in the yard of defendant at Detroit. The negligence complained of consisted of having *a sharp curve* in the yard of defendant where plaintiff was required to do his work of coupling cars.

The Circuit Court held that plaintiff assumed the risk of injury from the defect of which he complained, an in affirming the judgment this court (p. 194) said:—

"The brakemen and others employed to work in such situations must decide for themselves whether they will encounter the hazards incidental thereto; and if they decide to do so, they must be content to assume the risks. For the views of this court in a cognate matter, see Randall *v.* Baltimore & Ohio Railroad (109 U. S. 478, 482) where it was said: 'A railroad yard where trains are made up, necessarily has a great number of tracks and switches close to one another, and any one who enters the service of a railroad corporation connected with the moving of trains, assuming the risks of that condition of things.' It is for those who enter into such employments to exercise all that care and caution which the perils of the business in each case demand. The perils in the present case, arising from the sharpness of the curve, were seen and

known. They were not like the defects of unsafe machinery which the employer had neglected to repair, and which his employes have reason to suppose is in the proper working condition. Everything was open and visible, and the deceased had only to use his senses and his faculties to avoid the dangers to which he was exposed. One of these dangers was that of the draw-bars slipping and passing each other when the cars were brought together. It was his duty to look out for this and avoid it. The danger existed only on the inside of the curve. This must have been known to him. It will be presumed that, as an experienced brakeman, he did know it; for it was one of those things which happen, in the course of his employment, under such conditions as existed here."

We have already, in another paragraph, referred to the case of *Railroad Company* v. *Smithson* (45 Mich. 212), which was an action for personal injuries received by a brakeman in attempting to couple cars with "double deadwoods," the defect complained of being obvious to any one attempting to perform that duty.

In that case the court (p. 219) among other things said:—

"But on the other hand, no railroad company and no manufacturing or business establishment of any kind is bound at its peril to make use only of the best implements, the best machinery and the safest methods. The State does not require it, and could not require it, without keeping such minute and constant supervision of private affairs, and interfering with such frequency, as under all circumstances would be irritating and damaging, and in many cases would become intolerable. In the main the State must leave every man to manage his own business in his own way. If his way is not the best, but nevertheless others, with a full knowledge of what his way is, see fit to co-operate with him in it, the State cannot interfere to prevent, nor punish him in damages when the risks his servants voluntarily assume are followed by injuries."

In *Beach on Contributory Negligence*, 369 *et seq.*, the rule on this subject is stated, as follows: —

"As we have seen it to be the duty of the master to point out such dangers as are not patent, so it is the duty of the employe to go about his work with his eyes open. He may not wait to be told, but must act affirmatively. He must take ordinary care to learn the dangers which are likely to beset him in the service. If the master provides written or printed instructions or warning, it is his duty to read them. He must not go blindly and heedlessly to his work when there is danger. He must inform himself. This is the law everywhere. The servant is held, by his contract of hiring, to assume the risk of injury from the ordinary dangers of the employment; that is to say, from such dangers as are known to him, or discoverable by the exercise of ordinary care on his part. He has, therefore, no right of action in general, against his master for an injury befalling him from such a cause. His right to recover will often depend upon his knowledge or ignorance of the danger. If he knew of it, or was under a legal obligation to know of it, it was part of his contract, and he cannot, in general, recover."

In *2nd Thompson on Negligence*, 1008, the rule is stated, as follows:

"If the servant before he enters the service, knows, or if afterwards discovers, or if, by the exercise of ordinary observation or reasonable skill and diligence in his department of service he may discover, that the building, premises, machine, appliance, or fellow-servant, in connection with which or with whom he is to labor, is unsafe or unfit in any particular, and if, notwithstanding such knowledge or means of knowledge, he voluntarily enters into or continues in the employment without objection or complaint, he is deemed to assume the risk of the danger thus known or discoverable, and to waive any claim for damages against the master in case it shall result in injury to him."

The case of *Devitt* v. *Pacific Railroad Co.* (50. Mo.

305) is one that illustrates the same principle. There the defect complained of consisted of a low bridge over the track, but the deceased was familiar with the locality and knew the height of the bridge above the car on which he was riding, but failing to take the necessary precautions was knocked off and killed. In determining the right of his representative to recover, the court said:—

"Much of the work of the country is done without the employment of the best machinery or the most competent men, and it would be disastrous if those prosecuting it were held to insure the safety of all who enter their service. If persons are induced to engage, in ignorance of such neglect, and are injured in consequence, they should be entitled to compensation; but if advised of it, they assume its risk. They contract with reference to things as they are known to be, and no contract is violated and no wrong is done if they suffer from a neglect whose risk they assumed."

We, therefore, conclude, that upon the facts in this case, appellant was not entitled to recover because it is shown by the evidence that the defect in the cars, of which he complains, was open and obvious, and because he states in his own testimony that he saw before he attempted to make the coupling, the kind of dead-woods that were on them.

IV.

The fact that the draw-head on one of the cars was higher than the draw-head on the other, furnished no ground for recovery, because appellant knew of the inequality before he attempted to make the coupling.

Appellant testified that he knew the cars were of different heighth before he attempted to make the coupling.

On that point his evidence (*ante*, p. 7), is as follows:—

"Q. How far away from you was it (the approaching car) when you saw it coming down? A. It was within about a car length. I see it right along all the time and the pony conductor walked by the coupling and that left it for me to couple.

Q. His name was Billy Butler? A. Yes, sir.

Q. When it come down what did you find out about it? A. I see that it had a big dead-wood on it.

Q. What did you find out about the draw-bars? A. When it got so close I see that the draw-bar was so much higher than the draw-bar of the Merchants' Dispatch that it (the draw-bar of the Merchants' Dispatch) had to be raised up.

Q. Which draw-bar was the higher? A. The Central Railroad of New Jersey.

Q. That was the approaching car? A. Yes, sir.

Q. How much higher was it than the other car? A. Four inches.

On the foregoing evidence the case of *Hulett* v. *Ry. Co.* (67th Mo. 239) directly illustrates this case. There a brakeman undertook to couple two cars in nowise defective but of unequal heights, without using the ordinary crooked link adopted for preventing accident in such cases. He knew of the inequality in the height of the cars, their difference being obvious to the eye of any one, but he miscalculated and in consquence was injured, and it was held that he had no cause of action. In deciding that case, the court said:

"Now, the testimony of the plaintiff himself was that he was perfectly aware of the fact that the two cars were of different heights; that the difference was obvious to the eye of any one, and that being aware of this difference, he pushed up the draw-head of the flat car and turned down